No. 225

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# Supreme Court of New Jersey

Docket No. 2440

HARRY ELEUTERI, *et als*
*Plaintiffs-Appellants,*

*vs.*

GROVER C. RICHMAN, JR., Attorney General of New Jersey and MARTIN QUEENAN, Burlington County Prosecutor,
*Defendants-Respondents.*

Civil Action

On Appeal from Superior Court, Appellate Division.

Sat below:
Goldmann, Fruend & Conford, JJ. A. D.

## APPENDIX FOR APPELLANTS

POWELL AND DAVIS
*Attorneys for Plaintiffs-Appellants*
110 High Street
Mount Holly, New Jersey

JAMES M. DAVIS, JR.
*Of Counsel*

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# APPENDIX

## NOTICE OF APPEAL
(filed 3/1/57)

TO: GROVER C. RICHMAN, JR.,
Attorney General of New Jersey and
Attorney of the Defendants

PLEASE TAKE NOTICE that the plaintiffs do respectfully appeal to the Superior Court of New Jersey, Appellate Division, from an order entered herein on February 4, 1957 granting a summary judgment in favor of the defendants and from the judgment entered on that order.

POWELL AND DAVIS
Attorneys of Plaintiffs

By James M. Davis, Jr. /s/
James M. Davis, Jr.
A Member of the Firm

## COMPLAINT
(filed 3/29/56)

### FIRST COUNT

The plaintiff, Harry Eleuteri, who resides at 134 Second Street, in the City of Bordentown, County of Burlington and State of New Jersey, complains and says:

1. The defendant, Martin J. Queenan, is the duly appointed and qualified Prosecutor of the County of Burlington. He is charged by law with the duty of prosecuting alleged violations of the criminal law of the State of New Jersey, occurring in the County of Burlington, when the defendant, Grover C. Richman, Jr., is not present either in person or by deputy, to prosecute said business. The defendant, Grover C. Richman, Jr. is the duly appointed and qualified Attorney General of the State of New Jersey. He is the chief law and law enforcement officer of the State of New Jersey and has the power and duty to prosecute offenders against the criminal laws of the State of New Jersey in each and all of the several counties of this State whenever in his opinion it is necessary for him so to do. He is also the head of the principal department of the state government, known as the Department of Law and Public Safety and as such is in charge, inter alia, of the New Jersey State Police and the Training School thereof, both of which are parts of the Department of Law and Public Safety.

2. Article I, Paragraph 1 of the Constitution of New Jersey, declares that the rights of the plaintiff to enjoy and defend his life and liberty, to acquire, possess and protect his property and to pursue and obtain safety and happiness are not only natural rights, but rights which are unalienable.

3. Article I, Paragraph 7 of the Constitution of New Jersey, provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreason-

able searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized."

4. For many years, the courts of law as distinguished from the courts of equity of the State of New Jersey, have so construed "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures" as plainly stated by Article I, Paragraph 7 of the constitution of New Jersey, and its exact counterpart under the Constitution of the State of New Jersey adopted in the year 1844, in such manner that the people have no right to be secure in their persons, houses, papers and effects against the unreasonable searches and seizures perpetrated, performed and carried out by the law enforcement officers of this State except to the extent that such of the people as have been victimized in their persons, houses, papers and effects against unreasonable searches and seizures may have a right of action for damages against the law enforcement officer or officers who commit, perpetrate and carry out such unreasonable searches and seizures with respect thereto. In particular the construction uniformly placed upon said provision of the Constitution as aforesaid by the courts of law of this state, has had the effect

1. Of permitting searches and seizures of the persons, houses, papers and effects of the people when the same were wholly unauthorized by law;

2. Of permitting their goods, chattels, papers, documents, effects and paraphernalia to be taken and carried away by law enforcement officers with the same immunity and privilege as if the search and seizure had been reasonable, warranted and in all respects legal;

3. Of permitting evidence unlawfully obtained in viola-

tion of the fundamental law of our state by those who should be enforcing and upholding the law to be received in evidence on behalf of the sovereign at the trial of indictments against the people who were supposedly secure in their persons, houses, papers and effects from unreasonable searches and seizures;

4. Of making the word "secure" as employed in the Constitution aforesaid have a lesser and less valuable meaning to the people than it in its common usage implies and therefore of making the legal remedy for obtaining the security of the people in their persons, houses, papers and effects against unreasonable searches and seizures, wholly inadequate;

5. Of substituting in place of the word "security" guaranteed by the Constitution a right of action for damages of doubtful value, and

6. Of not only making this right alienable in violation of Article I, Paragraph 1 of the Constitution of New Jersey, but also illusory.

5. Because of the uniform and well established construction placed upon the searches and seizures clause of the Constitution of the State of New Jersey by the courts of law as aforesaid, for many years last past the State of New Jersey and its law enforcement officers, including attorneys general and county prosecutors and specifically including the defendants herein, has affirmatively sanctioned, practiced and encouraged unlawful, unwarranted, unjustifiable and unconstitutional police incursion into the privacy of the citizens of said state and law enforcement officials including the defendants have been encouraged to have themselves encouraged others subordinate to them and under their jurisdiction and control to take advantage of unconstitutional and unlawful searches of the persons and property of the citizens of New Jersey

and the unlawful and unconstitutional seizure of their property, well knowing that under the construction of the searches and seizures placed thereupon by the courts of law of this state, the people in effect have no gurantee of security against unreasonable searches and seizures by their Constitution but merely a court given right of action for damages against said law enforcement officers, well knowing that any property seized as a result of unlawful search or seizure is, under the construction of the courts of law, evidential against the persons from whom it was or were taken and well knowing that the judicial policy of the courts of law of this state is and has been such as to preclude the return or suppression of such unlawfully obtained evidence.

6. At all times mentioned herein, the plaintiff was a resident and citizen of the State of New Jersey, subject to the obligations of the Constitution and Laws of the State of New Jersey and entitled to claim the benefits of the aforementioned rights guaranteed thereby.

7. On or about August 22, 1954, the plaintiff, Harry Eleuteri, was in possession of a dwelling located at and known as 134 Second Street, in the City of Bordentown, County of Burlington and State of New Jersey.

8. On August 22, 1954, one George Dann, an officer and representative of the New Jersey State Police, and one of the subordinates of the defendant, Richman, made, signed, subscribed and swore to a written complaint, a copy of which is attached hereto, made part hereof and marked Exhibit "A", wherein and whereby he sought a search warrant to search the home of the plaintiff herein, although the same was described in said complaint as being the living quarters of one John Doe.

9. Said complaint was sworn to and filed with one C. C. C. Ellis, who was then and there the Magistrate of the Municipal Court of the Township of Chesterfield,

which said court had jurisdiction in and over the Township of Chesterfield, but not over the City of Bordentown, in the County of Burlington and State of New Jersey, where then and there was also a Municipal Court having available its own judge or magistrate thereof, which and who respectively had jurisdiction over matters arising and occurring within the City of Bordentown to the exclusion of all other Municipal Courts of said County and State and especially to the exclusion of the Municipal Court of the Township of Chesterfield and of the Honorable C. C. C. Ellis, the Judge and Magistrate thereof, and the said Magistrate C. C. C. Ellis without authority of law and in violation of Article I, Paragraph 7 of the Constitution of New Jersey and of Article I, Paragraph 1 of the same Constitution of the State of New Jersey, and of the First and Fourteenth Amendments to the Constitution of the United States of America, granted, executed, signed, sealed and issued to the aforesaid George Dann, a paper purporting to be a search warrant authorizing a search of premises located at and known as 134 Second Street, in the City of Bordentown, County of Burlington and State of New Jersey, a copy of which said paper is attached hereto, made part hereof and marked Exhibit "B". Not only was said purported search warrant void and illegal because of the want of jurisdiction in the Municipal Court of the Township of Chesterfield and in the Honorable C. C. C. Ellis, the Magistrate thereof, but it is also void and illegal for the reasons that no statutory or other authority exists for the issuance thereof, if jurisdiction of the court be assumed, and that the said purported search warrant does not "particularly" describe the papers and things to be seized as required by Article I, Paragraph 7 of the Constitution of New Jersey as aforesaid.

10. The illegal search and seizure complained of herein was part and parcel of the policy of the State of New

Jersey to encourage, sanction and practice unlawful, unwarranted, unjustifiable and unconstitutional police incursion into the privacy of the citizens of this State and particularly into the privacy of the plaintiff herein.

11. The plaintiff herein has no adequate remedy at law because without the papers, documents and other property taken from his home as a result of the unlawful search and seizure as aforesaid, the State of New Jersey could not prove that the plaintiff had committed any crime. However, as a result of the unlawful search and seizure complained of herein as aforesaid, an indictment was obtained by the predecessor of the defendant, Martin J. Queenan, all as a part of the unconstitutional policy of the State of New Jersey as aforesaid, which said indictment charges the plaintiff with having made and taken what is commonly known as a "book", upon the running of horses, mares and geldings, at the City of Bordentown, County of Burlington and State of New Jersey, on August 23, 1954, in violation of R. S. 2A:112-3, and at the same time and place that he "knowingly and unlawfully did possess divers papers, documents, slips and memoranda, pertaining to the business of lottery policy, so called, contrary to the provisions of R. S. 2A112:3." To obtain said indictment, the State of New Jersey relied upon the papers and property unlawfully seized from the plaintiff as aforesaid and will rely upon the same at the trial of said indictment and in the absence of the same cannot prove a prima facie case under said indictment. The plaintiff would be wholly unable to recover against any person damages adequate to compensate him for his having been convicted of crime as a result of evidence obtained in violation of his constitutional rights.

12. The defendant, Martin J. Queenan, has notified the plaintiff herein of his intention to move the trial of the indictment aforesaid at an early date and unless both he and the defendant, Grover C. Richman, Jr. are re-

strained and enjoined from so ding, the defendant, Grover C. Richman, Jr., may undertake the prosecution of said indictment.

WHEREFORE plaintiff demands judgment:

A. Declaring that the search of the plaintiff's premises on or about August 22 or 23, 1954, was under all of the circumstances, an unlawful and within the intent and meaning of Article I, Paragraph 7 of the Constitution of New Jersey, an unreasonable search and that the taking of such property as was taken as a result thereof was within the intent and meaning of said constitutional provision, an unreasonable seizure and that the right of the plaintiff to be secure in his house, papers and effects against unreasonable searches and seizures was then and there violated within the intent and meaning of Article I, Paragraph 7 of the Constitution of New Jersey.

B. That the defendants be required to make full disclosure and accounting to this Court of each and every item of property taken from the premises of the plaintiff as aforesaid, that they be required to either return each and every item thereof to the plaintiff herein or that they deliver the same up to this Honorable Court for destruction.

C. That they be temporarily and permanently enjoined and restrained from offering in evidence at the trial of the aforesaid indictment against the plaintiff herein any item of property or any paper or document taken as a result of said search and seizure.

D. That the defendants, and each of them, their subordinates and successors, be jointly and severally enjoined and restrained both temporarily and perpetually from making any other or further search of the plaintiff's premises or seizure of his property or otherwise violate the right of the plaintiff to be secure in his person, house,

papers and effects against unreasonable searches and seizures except upon warrant, issued upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

E. That the defendants, their respective subordinates and successors in office, be permanently and perpetually enjoined and restrained from further sanctioning in an affirmative way police incursion into the privacy of the plaintiff and the other citizens of the State of New Jersey.

## SECOND COUNT

The plaintiff, Edward Danley, who resides at 52 East Main Street, in the Village of Columbus, Township of Mansfield, County of Burlington and State of New Jersey, complains and says:

1. Paragraph 1 of the First Count is hereby repeated and made part hereof.

2. Paragraph 2 of the First Count is hereby repeated and made part hereof.

3. Paragraph 3 of the First Count is hereby repeated and made part hereof.

4. Paragraph 4 of the First Count is hereby repeated and made part hereof.

5. Paragraph 5 of the First Count is hereby repeated and made part hereof.

6. Paragraph 6 of the First Count is hereby repeated and made part hereof.

7. On or about August 22, 1954, the plaintiff, Edward Danley, was in possession of a dwelling located at and known as 52 East Main Street, Columbus, Burlington

County, New Jersey.

8. On or about August 22, 1954, one George Dann, an officer and representative of the New Jersey State Police and one of the subordinates of the defendant, Richman, made, signed, subscribed and swore to a written complaint, a copy of which is attached hereto, made part hereof and marked Exhibit "C" wherein and whereby he sought a search warrant to search premises located and known as 54 East Main Street, Columbus, New Jersey.

9. Said complaint was sworn to and filed with one C.C. C. Ellis, who was then and there the Magistrate of the Municipal Court of the Township of Chesterfield, which said court had jurisdiction in and over the Township of Chesterfield, but not over the Township of Mansfield, in the County of Burlington and State of New Jersey, where there then and there was also a Municipal Court having available its own judge or magistrate thereof, which and who respectively had jurisdiction over matters arising and occurring within the Township of Mansfield to the exclusion of all other Municipal Courts of said County and State and especially to the exclusion of the Municipal Court of the Township of Chesterfield and of the Honorable C.C.C.Ellis, the Judge and Magistrate thereof, and the said Magistrate C.C.C.Ellis without authority of law and in violation of Article I, Paragraph 7 of the Constitution of New Jersey and of Article I, Paragraph 1 of the same Constitution of the State of New Jersey, and of the First and Fourteenth Amendments to the Constitution of the United States of America, granted, executed, signed, sealed and issued to the aforesaid George Dann, a paper purporting to be a search warrant authorizing a search of premises located at and known as 54 East Main Street, in the Village of Columbus, Township of Mansfield, County of Burlington and State of New Jersey, a copy of which said paper is attached hereto, made part hereof and marked Exhibit "D". Not only was said purported search warrant void and illegal because of the want of jurisdic-

tion in the Municipal Court of the Township of Chesterfield and in the Honorable C. C. C. Ellis, the Magistrate thereof, but it is also void and illegal for the reasons that no statutory or other authority exists for the issuance thereof, if jurisdiction of the court be assumed, and that the said purported search warrant does not "particularly" describe the papers and things to be seized as required by Article I, Paragraph 7 of the Constitution of New Jersey as aforesaid.

10. The illegal search and seizure complained of herein was part and parcel of the policy of the State of New Jersey to encourage, sanction and practice unlawful, unwarranted, unjustifiable and unconstitutional police incursion into the privacy of the citizens of this State and particularly into the privacy of the plaintiff herein, in violation of the Fourteenth Amendment to the Constitution of the United States.

11. The plaintiff herein has no adequate remedy at law because without the papers, documents and other property taken from his home as a result of the unlawful search and seizure as aforesaid, the State of New Jersey could not prove that the plaintiff had committed any crime. However, as a result of the unlawful search and seizure complained of herein as aforesaid, an indictment was obtained by the predecessor of the defendant, Martin J. Queenan, all as a part of the unconstitutional policy of the State of New Jersey as aforesaid, which said indictment charges the plaintiff with having made and taken what is commonly known as a "book, upon the running of horses, mares and geldings," at the Township of Mansfield, County of Burlington and State of New Jersey, on August 23, 1954, in violation of R. S. 2A:112-3.

12. Paragraph 12 of the First Count is hereby repeated and made part hereof.

WHEREFORE plaintiff demands judgment:

A. Declaring that the search of the plaintiff's premises on or about August 22 or 23, 1954, was under all of the circumstances, an unlawful and within the intent and meaning of Article I, Paragraph 7 of the Constitution of New Jersey, an unreasonable search and that the taking of such property as was taken as a result thereof was within the intent and meaning of said constitutional provision, an unreasonable seizure and that the right of the plaintiff to be secure in his house, papers and effects against unreasonable searches and seizures was then and there violated within the intent and meaning of Article I, Paragraph 7 of the Constitution of New Jersey.

B. That the defendants be required to make full disclosure and accounting to this Court of each and every item of property taken from the premises of the plaintiff as aforesaid, that they be required to either return each and every item thereof to the plaintiff herein or that they deliver the same up to this Honorable Court for destruction.

C. That they be temporarily and permanently enjoined and restrained from offering in evidence at the trial of the aforesaid indictment against the plaintiff herein any item of property or any paper or document taken as a result of said search and seizure.

D. That the defendants, and each of them, their subordinates and successors, be jointly and severally enjoined and restrained both temporarily and perpetually from making any other or further search of the plaintiff's premises or seizure of his property or otherwise violate the right of the plaintiff to be secure in his person, house, papers and effects against unreasonable searches and seizures except upon warrant, issued upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and

things to be seized.

E. That the defendants, their respective subordinates and successors in office, be permanently and perpetually enjoined and restrained from further sanctioning in an affirmative way police incursion into the privacy of the plaintiff and the other citizens of the State of New Jersey.

POWELL AND DAVIS
Attorneys for Plaintiffs

By James M. Davis, Jr. /s/
James M. Davis, Jr.
A Member of the Firm

EXHIBIT "A"

Municipal Court

State of New Jersey )
) SS
County of Burlington )

Trooper George Dann, being of full age, and being duly sworn according to law, says that he has just and reasonable cause to suspect and does suspect and believe that the premises with buildings thereon, known as 134 Second Street, Bordentown, New Jersey, which is one of a row of houses, red brick, two and a half story, said premises being used as living quarters by one, John Doe, known as 134 Second Street, in the City of Bordentown, County of Burlington and State of New Jersey is being knowingly used as a place where gaming is taking place, in violation of N. J. S. 2A:112-3, and that his reasons for so suspecting and believing that said violations are taking place are as follows: That he has been reliably

informed that gaming is taking place in the premises known as above described property.

That said Trooper George Dann therefore prays that a Search Warrant may be issued to search for money, evidence and all other paraphernalia used in connection with gaming in and upon the above described premises.

/s/ Tpr. George Dann
Trooper George Dann.

Sworn and subscribed before
me, this 22nd day of August,
A. D. 1954.

/s/ Chas. Cuesta C. Ellis, Magistrate

(Seal)

EXHIBIT "B"

Municipal Court

State of New Jersey )
) SS
County of Burlington )

SEARCH WARRANT

THE STATE OF NEW JERSEY to any Police Officer of the County of Burlington: Greeting:

WHEREAS, it appears to me, Chas. Cuesta C. Ellis Magistrate of the Township of Chesterfield, in the County of Burlington, by the information by oath of Trooper George Dann, of the New Jersey State Police, it appears that he has just and reasonable cause to suspect and does suspect that the premises known as 134 Second

Street, Bordentown, New Jersey, which is one of a row of houses, red brick, two and a half story, said premises being used as living quarters by one, John Doe, known as 134 Second Street, in the City of Bordentown, County of Burlington and State of New Jersey, is being knowingly used as a place where gaming is taking place, in violation of N. J. S. 2A:112-3.

THESE presents are therefore, in the name of the State of New Jersey, to authorize and command you, with necessary and proper assistance, to enter into the aforesaid premises and buildings thereon and to diligently search for money and evidence used in connection with the said alleged crime, including any materials or things used in connection with the playing of said alleged crime in and upon said described premises and if you shall find the same, or any part thereof, then that you secure the same so found and bring same, together with the body of the person or persons found therein, before me or any other Judge of the Municipal Court in and for the County of Burlington, to be dealt with according to law.

GIVEN under my hand and seal this 22nd day of August, A. D., 1954.

s Chas. Cuesta C. Ellis, Magistrate

(Seal)

*Complaint*

EXHIBIT "C"

Municipal Court.

State of New Jersey )
) SS
County of Burlington )

Trooper George Dann, being of full age, and being duly sworn according to law, says that he has just and reasonable cause to suspect and does suspect and believe that the premises with buildings thereon, known as 54 E. Main Street, Columbus, New Jersey, being one-half of a two-story, double house, said building being a dirty gray in color, used as the residence of one, John Doe, known as 54 E. Main Street, Columbus, New Jersey, in the Township of Mansfield, County of Burlington and State of New Jersey, is being knowingly used as a place where gaming is taking place, in violation of N. J. S. 2A:112-3, and that his reasons for so suspecting and believing that said violations are taking place are as follows: That he has been reliably informed that gaming is taking place in the premises known as above described property.

That said Trooper George Dann therefore prays that a Search Warrant may be issued to search for money, evidence and all other paraphernalia used in connection with gaming in and upon the above described premises.

/s/ Tpr. George Dann
Trooper George Dann.

Sworn and subscribed before
me, this 22nd day of August,
A. D. 1954.

/s/ Chas. Cuesta C. Ellis, Magistrate

(Seal)

*Complaint*

EXHIBIT "D"

Municipal Court.

State of New Jersey )
) SS
County of Burlington )

SEARCH WARRANT

THE STATE OF NEW JERSEY to any Police Officer of the County of Burlington: Greeting:

WHEREAS, it appears to me, Chas. Cuesta C. Ellis Magistrate of the Township of Chesterfield, in the County of Burlington, by the information by oath of Trooper George Dann, of the New Jersey State Police, it appears that he has just and reasonable cause to suspect and does suspect that the premises known as 54 E. Main Street, Columbus, New Jersey, being one-half of a two-story, double house, said building being a dirty gray in color, used as the residence of one, John Doe, known as 54 E. Main Street, Columbus, New Jersey, in the Township of Mansfield, County of Burlington and State of New Jersey, is being knowingly used as a place where gaming is taking place, in violation of N. J. S. 2A:112-3.

THESE presents are therefore, in the name of the State of New Jersey, to authorize and command you, with necessary and proper assistance, to enter into the aforesaid premises and buildings thereon and to diligently search for money and evidence used in connection with the said alleged crime, including any materials or things used in connection with the playing of said alleged crime in and upon said described premises and if you shall find the same, or any part thereof, then that you secure the same so found and bring same, together with the body of the person or persons found therein, before me or

any other Judge of the Municipal Court in and for the County of Burlington, to be dealt with according to law.

GIVEN under my hand and seal this 22nd day of August A. D. 1954.

/s/ Chas. Cuesta C. Ellis, Magistrate

(Seal)

## NOTICE OF MOTION FOR SUMMARY JUDGMENT

(filed )

To: Powell and Davis, Esqs.
110 High Street
Mount Holly, New Jersey

Take notice that on Friday, September 21, 1956, at 10:00 o'clock in the forenoon (E.D.S.T.) or as soon thereafter as counsel can be heard, the undersigned, Attorney General of New Jersey, attorney for the defendants herein, will apply to the Superior Court, Burlington County, Chancery Division at the Court House, Camden, New Jersey, for an order dismissing the first and second counts of the complaint filed herein and for the entry of a summary judgment in favor of the defendants dismissing the action upon the grounds that the complaint fails to state claims upon which relief can be granted; and further on the ground the defendant Richman is an officer of the State of New Jersey and may not be sued in his capacity as Attorney General.

GROVER C. RICHMAN, JR.
Attorney General of New Jersey
By Stanley Cohen /s/
Deputy Attorney General
Attorney for defendants

## ORDER GRANTING LEAVE TO AMEND
(filed 2/4/57)

The plaintiffs having filed their complaint in the above entitled matter and the defendants having moved for a summary judgment; and the court having heard and considered the oral arguments of James M. Davis, Jr., Esq., of Powell and Davis, Esqs., Attorneys of the Plaintiff, and of Grover C. Richman, Jr., Esq., Attorney General of New Jersey, by Stanley Cohen, Esq., a Deputy Attorney General of New Jersey; and the court having read and considered the briefs submitted by all of the parties; and it being made to appear during the oral argument and during the briefing of said motion that the plaintiffs' complaint required amendment; and the parties having argued and briefed said cause and the court having heard, consjdered and decided the same as though said amendments had been formally allowed and made; and application now being made for leave to amend the complaint following the filing by the court of an opinion leading to a summary judgment in favor of the defendants to the end that the record herein might be full and complete; and good cause appearing;

It is, on this 4th day of February, 1957, on motion of James M. Davis, Jr., Esq., of Powell and Davis, Esqs., Attorneys of the Plaintiffs, ORDERED that the leave of this court be the same is hereby granted to the plaintiffs to file an amended complaint so that as amended the said complaint will allege facts in conformity with those considered by the court on the motion of the defendants for summary judgment.

Vincent S. Haneman s
J. S. C.

I consent to the entry of the foregoing order.

Grover C. Richman, Jr. By David D. Furman s
Attorney General of N. J. Deputy Attorney General
Attorney of Defendants

# AMENDED COMPLAINT

(Filed )

## FIRST COUNT

The plaintiff, Harry Eleuteri, who resides at 134 Second Street, in the City of Bordentown, County of Burlington and State of New Jersey, complains and says:

1. The defendant, Martin J. Queenan, is the duly appointed and qualified Prosecutor of the County of Burlington. He is charged by law with the duty of prosecuting alleged violations of the criminal law of the State of New Jersey, occurring in the County of Burlington, when the defendant, Grover C. Richman, Jr., is not present either in person or by deputy, to prosecute said business. The defendant, Grover C. Richman, Jr. is the duly appointed and qualified Attorney General of the State of New Jersey. He is the chief law and law enforcement officer of the State of New Jersey and has the power and duty to prosecute offenders against the criminal laws of the State of New Jersey in each and all of the several counties of this State whenever in his opinion it is necessary for him so to do. He is also the head of the principal department of the state government, known as the Department of Law and Public Safety and as such, is in charge, inter alia, of the New Jersey State Police and the Training School thereof, both of which are parts of the Department of Law and Public Safety.

2. Article I, Paragraph 1 of the Constitution of New Jersey, declares that the rights of the plaintiff to enjoy and defend his life and liberty, to acquire, possess and protect his property and to pursue and obtain safety and happiness are not only natural rights, but rights which are unalienable.

3. Article I, Paragraph 7 of the Constitution of New Jersey, provides as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized."

4. The Fourth Amendment to the Constitution of the United States provides as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

5. The Fourteenth Amendment to the Constitution of the United States provides, inter alia, as follows:

"nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

6. Article VI (and the second clause thereof) of the Constitution of the United States provided, inter alia, as follows:

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; * * *"

7. Article VI (and the third clause thereof) of the Constitution of the United States provides as follows:

"The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and the several States, shall be bound by oath or affirmation to support this Constitution; but no religious Test shall ever be required as a qualification to any Office or public Trust under the United States."

8. At all times mentioned herein, the plaintiff was a resident and citizen of the State of New Jersey and of the United States and had the right under the Fourth and Fourteenth Amendments to the Constitution of the United States and under Article I, Paragraph 7 of the Constitution of New Jersey to be secure in his person, house, papers and effects against unreasonable searches and seizures, to enjoy that right free from a violation thereof by the State of New Jersey and its executive officers, in particular, to have the Attorney General of the State of New Jersey and those subordinate to him in authority and the County Prosecutor of Burlington County and those subordinate to him in authority and both of them to be bound by their respective oaths to support the Constitution of the United States and to refrain from violating the plaintiff's right of security as aforesaid, to be subjected to no search or seizure except pursuant to a warrant issued upon probable cause by an official having lawful jurisdiction to issue the same, the warrant being supported by oath or affirmation and particularly describing the place to be searched and the papers and things to be seized.

9. The defendants and each of them have taken an oath to support the Constitution of the United States and to support the Constitution of the State of New Jersey and each of them is bound by the Constitution of the United States and by their respective oaths to support

the Constitution of the United States and each of them is bound by the Constitution of the State of New Jersey and by his respective oath to support the Constitution of the State of New Jersey and in the event of a conflict between the two, to support the Constitution of the United States,

10. For many years the courts of law, as distinguished from the courts of equity, of the State of New Jersey, have so construed Article I, Paragraph 7 of the Constitution of New Jersey and its exact counterpart under the Constitution of the State of New Jersey adopted in the year 1844, in such manner that a citizen whose right of privacy has been violated by an unreasonable search and seizure has been given a right of action for damages for the breach thereof, but to deny such a person the right to be secure in the full sense and meaning of the word, "secure", as employed in Article I, Paragraph 7 of the Constitution of New Jersey and in such manner that the citizen is not protected from a violation of that right which has been forbidden by Article I, Paragraph 7 of the Constitution of New Jersey. Neither have the courts of law of the State of New Jersey ever given full effect to the full meaning of the Fourth Amendment to the Constitution of the United States, although the Supreme Court of the United States has adjudged that the protection of the Fourth Amendment does extend to the citizen as against state action by reason of the Fourteenth Amendment and although the Supreme Court of the United States has also declared that a citizen is entitled as a part of the guaranties of the Fourth Amendment not to be confronted in a criminal court with property seized from him in a search and seizure carried on in violation of the Fourth Amendment. To the extent that the courts of law of the State of New Jersey have given effect to Article I, Paragraph 7 of the Constitution of the State of New Jersey and to the Fourth Amendment and the

Fourteenth Amendment to the Constitution of the United States, the policy of the courts of law of the State of New Jersey has had the effect

A. of permitting searches and seizures of the persons, houses, papers and effects of the people when the same were wholly unauthorized by law;

B. of permitting their goods, chattels, papers, documents effects and paraphenalia to be taken and carried away by law enforcement officers with the same immunity and privilege as if the search and seizure had been reasonable, warranted and in all respects legal;

C. of permitting evidence unlawfully obtained in violation of Article I, Paragraph 7 of the Constitution of the State of New Jersey or in violation of the Fourth Amendment and of the Fourteenth Amendment to the Constitution of the United States, or both, by those who are bound to support the Constitution of the United States and the Constitution of the State of New Jersey to unlawfully take, to unlawfully hold and possess as against the true owner, to take into court and there to expose to the view of other persons including judges and juries, the papers and effects of citizens to whom the Constitution of the United States and the Constitution of New Jersey guaranteed security against unlawful searches and seizures and against the violation of that right;

D. of making the word, "secure", as employed in the Constitutions aforesaid, have a less effective meaning than the Constitutions respectively were intended to have, and therefore of making the legal remedy afforded by the courts of law of the State of New Jersey for a violation of that right wholly inadequate;

E. of making the right of privacy alienable in violation of Article I, Paragraph 1 of the Constitution of the

State of New Jersey.

11. Because of the uniform and well established construction placed upon the searches and seizures clause of the Constitution of New Jersey by the courts of law as aforesaid, for many years last past the State of New Jersey and its law enforcement officers, including attorneys general and county prosecutors and specifically including the defendants herein, has affirmatively sanctioned, practised and encouraged unlawful, unwarranted, unjustifiable and unconstitutional police incursion into the privacy of the citizens of said state and law enforcement officials including the defendants have been encouraged to and have themselves encouraged other subordinate to them and under their jurisdiction and control to take advantage of unconstitutional and unlawful searches of the persons and property of the citizens of New Jersey and the unlawful and unconstitutional seizure of their property, well knowing that under the construction of the searches and seizures placed thereupon by the courts of law of this state, the people in effect have no guarantee of security against unreasonable searches and seizures by their Constitution, but merely a court given right of action for damages against said law enforcement officers, well knowing that any property seized as a result of an unlawful search and seizure is, under the construction of the courts of law, evidential against the persons from whom it was or were taken and well knowing that the judicial policy of the courts of law of this state is and has been such as to preclude the return or suppression of such unlawfully obtained evidence.

12. On or about August 22, 1954, the plaintiff, Harry Eleuteri, was in possession of a dwelling located at and known as 134 Second Street, in the City of Bordentown, County of Burlington and State of New Jersey.

13. On August 22, 1954, one George Dann, an officer and representative of the New Jersey State Police, and one of the subordinates of the defendant, Richman, made, signed, subscribed and swore to a written complaint, a copy of which is attached to the original complaint filed herein and marked Exhibit "A", wherein and whereby he sought a search warrant to search the home of the plaintiff herein, although the same was described in said complaint as being the living quarters of one "John Doe".

14. Said complaint was sworn to and filed with one C. C. C. Ellis, who was then and there the Magistrate of the Municipal Court of the Township of Chesterfield, which said court had jurisdiction in and over the Township of Chesterfield, but not over the City of Bordentown, in the County of Burlington and State of New Jersey, where there then and there was also a Municipal Court having available its own judge or magistrate thereof, which and who respectively had jurisdiction over matters arising and occurring within the City of Bordentown to the exclusion of all other Municipal Courts of said County and State and especially to the exclusion of the Municipal Court of the Township of Chesterfield and of the Honorable C. C. C. Ellis, the Judge and Magistrate thereof, and the said Magistrate C. C. C. Ellis without authority of law and in violation of Article I, Paragraph 7 of the Constitution of New Jersey and of Article I, Paragraph 1 of the same Constitution of the State of New Jersey, and of the First and Fourteenth Amendments to the Constitution of the United States of America, granted, executed, signed, sealed and issued to the aforesaid George Dann, a paper purporting to be a search warrant authorizing a search of premises located at and known as 134 Second Street, in the City of Bordentown, County of Burlington and State of New Jersey, a copy of which said paper is attached to the original complaint

filed herein and marked Exhibit "B". Not only was said purported search warrant void and illegal because of the want of jurisdiction in the Municipal Court of the Township of Chesterfield and in the Honorable C. C. C. Ellis, the Magistrate thereof, but it is also void and illegal for the reasons that no statutory or other authority exists for the issuance thereof, if jurisdiction of the court be assumed, and that the said purposed search warrant does not "particularly" describe the papers and things to be seized as required by Article I, Paragraph 7 of the Constitution of New Jersey as aforesaid.

15. On or about August 22, 1954, in violation of Article I, Paragraphs 1 and 7 of the Constitution of New Jersey and of the Fourth and Fourteenth Amendments to the Constitution of the United States, one George Dann, who was then and there a member and representative of the New Jersey State Police and a subordinate to and under the control of the defendant, Richman, illegally and unreasonably searched the premises of the plaintiff, Harry Eleuteri, at 134 Second Street, in the City of Bordentown, County of Burlington and State of New Jersey, and illegally and unreasonably and in further violation of the Constitutions as aforesaid, took, seized and carried away papers, money and property of the plaintiff, Harry Eleuteri.

16. As part and parcel of the original seizure, the said George Dann has either continued to hold and possess, illegally and unreasonably as aforesaid, the property of the plaintiff herein, or he has delivered the same to some other person, in either of which events, the said property and money is in the possession and control of a person or persons who are subordinate to and under the control and direction of the defendants, or one of them, to such an extent that in practical and legal effect the defendants, or one of them, are or is

illegally and unreasonably and unlawfully holding said property against and against the will of the plaintiff herein and in violation of his rights under the Constitutions as aforesaid and the defendents further threaten to enlarge and aggravate the original and unlawful search and seizure by taking said money and property into a court room and to expose the same to the view of a judge or judges and one or more jurors and other court personnel who may be interested therein in an attempt to convict the plaintiff herein of a criminal offense, all of which the plaintiff submits is not in support of the Constitution of the State of New Jersey and of the Constitution of the United States but is in violation of each of the same, and, if said threatened conduct be carried out, will be in violation of Article VI of the Constitution of the United States.

17. The illegal search and seizure complained of herein was part and parcel of the policy of the State of New Jersey to encourage, sanction and practice unlawful, unwarranted, unjustifiable and unconstitutional police incursion into the privacy of the citizens of this State and particularly into the privacy of the plaintiff herein.

18. The plaintiff herein has no adequate remedy at law because without the papers, documents and other property taken from his home as a result of the unlawful search and seizure as aforesaid, the State of New Jersey could not prove that the plaintiff had committed any crime. However, as a result of the unlawful search and seizure complained of herein as aforesaid, an indictment was obtained by the predecessor of the defendant, Martin J. Queenan, all as a part of the unconstitutional policy of the State of New Jersey as aforesaid, which said indictment charges the plaintiff with having made and taken what is commonly known

as a "book", upon the running of horses, mares and geldings, at the City of Bordentown, County of Burlington and State of New Jersey, on August 23, 1954, in violation of R. S. 2A:112-3, and at the same time and place that he "knowingly and unlawfully did possess divers papers, documents, slips and memoranda, pertaining to the business of lottery policy, so called, contrary to the provisions of R. S. 2A:112-3." To obtain said indictment, the State of New Jersey relied upon the papers and property unlawfully seized from the plaintiff as aforesaid and will rely upon the same at the trial of said indictment and in the absence of the same cannot prove a prima facie case under said indictment. The plaintiff would be wholly unable to recover against any person damages adequate to compensate him for his having been convicted of crime as a result of evidence obtained in violation of his constitutional rights.

19. The defendant, Martin J. Queenan, has notified the plaintiff herein of his intention to move the trial of the indictment aforesaid at an early date and unless both he and the defendant, Grover C. Richman, Jr., are restrained and enjoined from so doing, the defendant, Grover C. Richman, Jr., may undertake the prosecution of said indictment.

WHEREFORE plaintiff demands judgment:

A. Declaring that the search of the plaintiff's premises on or about August 22, 1954, was under all of the circumstances, an unlawful search within the intent and meaning of Article I, Paragraph 7 of the Constitution of New Jersey and of the Fourth Amendment to the Constitution of the United Sta and that the taking, retention and threatened use of the laintiff's property was and is, and, if persisted in, will be and will continue to be an unlawful seizure of the plaintiff's property within the intent and meaning of Article I, Paragraph 7 of the

Constitution of New Jersey and of the Fourth Amendment to the Constitution of the United States; and that the right of the plaintiff to be secure in his house, papers and effects against unreasonable searches and seizures was then and there violated within the intent and meaning of Article I, Paragraph 7 of the Constitution of New Jersey and of the Fourth Amendment to the Constitution of the United States.

B. That the defendants be required to make full disclosure and accounting to this Court of each and every item of property taken from the premises of the plaintiff as aforesaid, that they be required to either return each and every item thereof to the plaintiff herein or that they deliver the same up to this Honorable Court for destruction.

C. That they be temporarily and permanently enjoined and restrained from offering in evidence at the trial of the aforesaid indictment against the plaintiff any item of property or any paper or document taken as a result of said search and seizure.

D. That the defendants, and each of them, their subordinates and successors, be jointly and severally enjoined and restrained both temporarily and perpetually from making any other or further search of the plaintiff's premises or seizure of his property or otherwise violate the right of the plaintiff to be secure in his person, house, papers and effects against unreasonable searches and seizures except upon warrant, issued upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

E. That the defendants, their respective subordinates and successors in office, be permanently and perpetually enjoined and restrained from further sanctioning in an affirmative way police incursion into the privacy of the

plaintiff and the other citizens of the State of New Jersey.

## SECOND COUNT

The plaintiff, Edward Danley, who resides at 52 East Main Street, in the Village of Columbus, Township of Mansfield, County of Burlington and State of New Jersey, complains and says:

1. Paragraph 1 of the First Count is hereby repeated and made part hereof.

2. Paragraph 2 of the First Count is hereby repeated and made part hereof.

3. Paragraph 3 of the First Count is hereby repeated and made part hereof.

4. Paragraph 4 of the First Count is hereby repeated and made part hereof.

5. Paragraph 5 of the First Count is hereby repeated and made part hereof.

6. Paragraph 6 of the First Count is hereby repeated and made part hereof.

7. Paragraph 7 of the First Count is hereby repeated and made part hereof.

8. Paragraph 8 of the First Count is hereby repeated and made part hereof.

9. Paragraph 9 of the First Count is hereby repeated and made part hereof.

10. Paragraph 10 of the First Count is hereby repeated and made part hereof.

11. Paragraph 11 of the First Count is hereby repeated and made part hereof.

12. On or about August 22, 1954, the plaintiff, Edward Danley, was in possession of a dwelling located at and known as 52 East Main Street, Columbus, Burlington County, New Jersey.

13. On or about August 22, 1954, one George Dann, an officer and representative of the New Jersey State Police and one of the subordinates of the defendant, Richman, made, signed, subscribed and swore to a written complaint, a copy of which is attached to the original complaint filed herein as Exhibit "C", wherein and whereby he sought a search warrant to search premises located and known as 54 East Main Street, Columbus, New Jersey.

14. Said complaint was sworn to and filed with one C. C. C. Ellis, who was then and there the Magistrate of the Municipal Court of the Township of Chesterfield, which said court had jurisdiction in and over the Township of Chesterfield, but not over the Township of Mansfield, in the County of Burlington and State of New Jersey, where then and there was also a Municipal Court having available its own judge or magistrate thereof, which and who respectively had jurisdiction over matters arising and occurring within the Township of Mansfield to the exclusion of all other Municipal Courts of said County and State and especially to the exclusion of the Municipal Court of the Township of Chesterfield and of the Honorable C. C. C. Ellis, the Judge and Magistrate thereof, and the said Magistrate C. C. C. Ellis without authority of law and in violation of Article I, Paragraph 7 of the Constitution of New Jersey and of Article I, Paragraph 1 of the same Constitution of the State of New Jersey, and of the First and Fourteenth Amendments to the Constitution of the United States of America, granted, executed, signed, sealed and issued to the aforesaid George Dann, a paper purporting to be a search warrant authorizing a search of premises located at and known as 54 East Main Street, in the Village of Columbus, Township of Mansfield,

County of Burlington and State of New Jersey, a copy of which said paper is attached to the original complaint filed herein and marked Exhibit "D". Not only was said purported search warrant void and illegal because of the want of jurisdiction in the Municipal Court of the Township of Chesterfield and in the Honorable C. C. C. Ellis, the Magistrate thereof, but it is also void and illegal for the reasons that no statutory or other authority exists for the issuance thereof, if jurisdiction of the court be assumed, and that the said purported search warrant does not "particularly" describe the papers and things to be seized as required by Article I, Paragraph 7 of the Constitution of New Jersey as aforesaid.

15. In violation of Article I, Paragraphs 1 and 7 of the Constitution of New Jersey and of the Fourth and Fourteenth Amendments to the Constitution of the United States, on or about August 22, 1954, one George Dann, who was then and there a member and representative of the New Jersey State Police and a subordinate to and under the control of the defendant, Richman, illegally and unreasonably searched the premises of the plaintiff, Edward Danley, at 52 East Main Street, Columbus, Burlington County, New Jersey, and illegally and unlawfully and in further violation of the Constitutions as aforesaid, took, seized and carried away papers, money and property of the plaintiff, Edward Danley.

16. As part and parcel of the original seizure, the said George Dann has either continued to hold and possess, illegally and unlawfully as aforesaid, the property of the plaintiff herein, or he has delivered the same to some other person, in either of which events, the said property and money is in the possession and control of a person or persons who are subordinate to and under the control and direction of the defendants, or one of them, to such an extent that in practical and legal effect the defendants, or one of them, are or is illegally and unlawfully

holding said property against and against the will of the plaintiff herein and in violation of his rights under the Constitutions as aforesaid and the defendants further threaten to enlarge and aggravate the original and unlawful search and seizure by taking said money and property into a court room and to expose the same to the view of a judge or judges and one or more jurors and other court personnel who may be interested therein in an attempt to convict the plaintiff herein of a criminal offense, all of which the plaintiff submits is not in support of the Constitution of the State of New Jersey and of the Constitution of the United States but is in violation of each of the same, and, if said threatened conduct be carried out, will be in violation of Article VI of the Constitution of the United States.

17. Paragraph 17 of the First Count is hereby repeated and made part hereof.

18. Paragraph 18 of the First Count is hereby repeated and made part hereof.

19. Paragraph 19 of the First Count is hereby repeated and made part hereof.

WHEREFORE plaintiff demands judgment:

A. Declaring that the search of the plaintiff's premises on or about August 22, 1954, was under all of the circumstances, an unlawful search within the intent and meaning of Article I, Paragraph 7 of the Constitution of New Jersey and of the Fourth Amendment to the Constitution of the United States and that the taking, retention and threatened use of the plaintiff's property was and is, and, if persisted in, will be and will continue to be an unlawful seizure of the plaintiff's property within the intent and meaning of Article I, Paragraph 7 of the Constitution of New Jersey and of the Fourth Amendment to the Constitution of the United States; and that the right of the

plaintiff to be secure in his house, papers and effects against unreasonable searches and seizures was then and there violated within the intent and meaning of Article I, paragraph 7 of the Constitution of New Jersey and of the Fourth Amendment to the Constitution of the United States.

B. That the defendants be required to make full disclosure and accounting to this Court of each and every item of property taken from the premises of the plaintiff as aforesaid, that they be required to either return each and every item thereof to the plaintiff herein or that they deliver the same up to this Honorable Court for destruction.

C. That they be temporarily and permanently enjoined and restrained from offering in evidence at the trial of the aforesaid indictment against the plaintiff herein any item of property or any paper or document taken as a result of said search and seizure.

D. That the defendants, and each of them, their subordinates and successors, be jointly and severally enjoined and restrained both temporarily and perpetually from making any other or further search of the plaintiff's premises or seizure of his property or otherwise violate the right of the plaintiff to be secure in his person, house, papers and effects against unreasonable searches and seizures except upon warrant, issued upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

E. That the defendants, their respective subordinates and successors in office, be permanently and perpetually enjoined and restrained from further sanctioning in an

affirmative way police incursion into the privacy of the plaintiff and the other citizens of the State of New Jersey.

POWELL AND DAVIS
Attorneys for Plaintiffs

By James M. Davis, Jr.
A Member of the Firm

## CONCLUSIONS
(filed )

Mr. James M. Davis, Jr. (Powell & Davis), for Plaintiffs.

Mr. Stanley Cohen, Deputy Attorney General, for defendants.

HANEMAN, J. S. C.

Defendant, Grover C. Richman, Jr., Attorney General of New Jersey, has moved for a summary judgment on the pleadings. For the purpose of this motion, the facts as pleaded in the complaint must be taken as true.

The complaint is in two counts. One relates to the plaintiff, Harry Eleuteri, the second to the plaintiff Edward Danley. Although the details of the two causes of action vary somewhat factually, the issues raised are common to both. The complaint alleges that:

The plaintiffs are residents and citizens of the State of New Jersey and entitled to the benefits and rights guaranteed by the constitution and laws of this State and of the United States. Each of them possessed a dwelling house within the County of Burlington and each of them was subjected to a search which was illegal, as violative

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of both the Federal and State constitutions. As a result of the unlawful search of the plaintiffs' properties, there was obtained by an unlawful seizure certain papers, documents and other property which was relied upon by the defendants to obtain indictments against the plaintiffs, charging them with bookmaking, and which the State of New Jersey relies and will rely upon as evidence against them in a trial of the said indictments.

Although the constitution of the State of New Jersey guarantees to the plaintiffs the right to be secure in their persons, houses, papers and effects against unreasonable searches and seizures and against the violation of that right, by Article I and Article 7, the courts of law of this State have ruled that evidence seized in a search and seizure which violates the State constitution is nonetheless admissible at a criminal trial of those who own said property. The affect of said construction by the law courts in effect denies to the plaintiffs their right to be secure against unreasonable search and seizure.

The sole remedy they have is a civil action for damages against the officers who trespassed upon their property and against their persons in violation of the constitutional guarantee, and this remedy is not adequate.

They demand judgment declaring that the searches and seizures complained of constitutes an unconstitutional invasion of their persons and property, that the defendants be required to make a full disclosure and accounting of each and every item of property taken from the premises of the plaintiffs, and that they either be required to return it to them or deliver it to this court for destruction. They further seek a permanent injunction restraining the defendants from offering in evidence at the trial of the above indictments any of the papers, documents or property seized as above set forth, and an injunction against any other and further similar searches and seizures in the future.

Plaintiffs further allege that:

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The above acts constituted a violation of the rights guaranteed to them under the Fourth Amendment to the Constitution of the United States, and through the Fourteenth Amendment of the Constitution of the United States the violation is a taking of their liberty and property without due process of law. The defendants were obligated to take an oath to support the constitution of the United States and the threatened conduct of the defendants is indicative of an official conscience departing from the obligation of the oath required by the Constitution of the United States, and actually taken by the defendants.

By way of relief they demand an injunction, the affect of which would be to direct the official conscience of the defendants in such fashion as to be consistent with and in harmony with the due process of law under the Fourteenth Amendment, including the obligations of the defendants to observe the rights the plaintiffs enjoy under the Fourth Amendment to the Constitution.

We will deal first with the defendant's contention that the defendant Richman is immune from suit because he is the Attorney General of the State of New Jersey and that, therefore, he is the alter ego of the State, and that as such, this suit is a suit against the State, since a judgment obtained will operate to control the action of the State.

The suit here brought does not deny the principle of the sovereign immunity from suit without its consent. This is not a suit against the State, since the gravamen of the action is the invasion of the personal and property rights of the plaintiffs by an officer of the State acting in an unconstitutional manner. The keeping of officers and agencies of the State within lawful bounds does not constitute a restraint upon State action. The cloak of immunity from suit is stripped from them when their acts constitute an illegal or unconstitutional violation of the

plaintiff's rights. *Abelson's, Inc. v. N. J. State Bd. of Optometrists*, 5 N. J. 412 (1950); *Interstate Milk Handlers v. Hoffman*, 34 N. J. Super. 356 (App. Div. 1955); *Howard Co. Jewelers v. N. J. State Bd. Optometrists*, 133 N. J. Eq. 4 (Ch. 1943).

It is therefore here held that this basis of the defendants' motion is without merit.

It now becomes necessary to examine plaintiffs' complaint in order to ascertain whether it states a cause of action upon which relief can be granted.

At the outset it must be conceded that under the so-called Weeks Doctrine, established by the United States Supreme Court in *Weeks v. United States*, 232 U. S. 383, 58 L. Ed. 652 (1914), that in a Federal prosecution of a crime, the Fourth Amendment to the United States Constitution bars the use of evidence secured through illegal search and seizure, but in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure in violation of the Fourth Amendment. In *Wolf v. Colorado*, 338 U. S. 25, 94 L. Ed. 1792 (1949), the court said:

> "Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such policies incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.
>
> "Granting that in practice the exclusion of evi-

dence may be an effective way of determining unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective. Weighty testimony against such an insistence on our own view is furnished by the opinion of Mr. Justice, then Judge, Cardozo in *People v. Defore*, 242 N. Y. 13, 150 N. E. 585. We cannot brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy not by way of disciplinary measures but by overriding the relevant rules of evidence."

The remedy herein sought by way of injunction has been denied in applications to the Federal Courts. *Stefanelli v. Minard*, 342 U. S. 117, 96 L. ed. 138 (1951); *Doyle v. Webb*, 237 Fed. 2d 335 (U. S. C. A. 1956).

It must also be recognized that courts of law in this State have declared evidence illegally seized in an illegal search to be admissible in the courts of this State, *State v. Haines*, 103 N. J. L. 534 (Sup. Ct. 1927); *State v. Lyons*, 99 N. J. L. 301 (E. & A. 1923); *Stern v. Merra*, 103 N. J. L. 361 (E. & A. 1927); *State v. Gould*, 99 N. J. L. 17 (Sup. Ct. 1923); *State v. Gillette*, 103 N. J. L. 523 (Sup. Ct. 1927); *State v. Guida*, 118 N. J. L. 289 (Sup. Ct. 1937), affirmed 119 N. J. L. 464 (E. & A. 1938); *State v. Alexander*, 7 N. J. 585 (1951), and that such courts of law will not suppress the evidence so obtained on a motion. *In re 301-317 Clinton Avenue*, 35 N. J. Super. 136 (Essex County Court 1955); *State v. Mausert*, 88 N. J. L. 286 (E. & A. 1915).

The question of the adequacy of plaintiffs' remedy in a court of law is quite patently the primary matter to be considered in concluding whether relief may be accorded in this action. This action concerns itself not with a

threatened violation but rather with an accomplished act. There is no factual allegation that the defendants contemplate a further illegal search and seizure, and this opinion will treat only of the other relief demanded and not of the relief against acts in futuro.

There are open to the plaintiffs several civil remedies in the courts of law for redress of an illegal search and seizure. First, an action of replevin or of trespass de bonis asportatis would lie, the original taking of possession by the defendants being unlawful or tortious ab initio. *Baron v. Peoples National Bank of Secaucus*, 9 N. J. 249 (1952); *Hebres v. Pulis*, 73 N. J. L. 621 (E. & A. 1906). Second, a civil action for trespass quare clausum fregit.

The plaintiffs, however, conceive that the relief thus accorded to them is inadequate. It is difficult to conceive why an action in replevin or trespass is an inadequate civil remedy, since they could receive both compensatory damages and punitive damages for the trespass, and could also obtain re-possession of the articles taken.

Wherein do plaintiffs allege an inadequacy of the remedy at law? Not in the inability to recover damages for the alleged illegal search and seizure, nor in the inability to recover by replevin the articles of personalty tortiously seized. They allege that they seek a specific performance of a contract between the defendants and themselves, arising from constitutional provisions, and that the relief afforded in the law courts for a breach of this contract, i.e., a violation of their constitutional guarantees, is inadequate because the admission and use of evidence so seized, by the law courts, effectually voids or changes such guarantees.

Stripped of the fine-spun and ably presented arguments, what plaintiffs actually bottom their contentions of inadequate relief on, is their inability to suppress the evidence so obtained in the law division. They do not rec-

ognize the civil remedies in the law courts as any form of remedy. What they are saying is, that since they have been indicted upon the presentation of this evidence and may be convicted of the commission of a crime by reason of the use of this evidence, that their remedy is inadequate. If this were not the final conclusion, the remedies at law would be inadequate. They are not stating that their remedy for the constitutional violation is inadequate, but rather that they have no adequate remedy to prevent the use of the articles so seized in a criminal action.

In effect, what the plaintiffs are urging is that the inadequacy of remedy lies in their inability to suppress as evidential the paraphernalia which might establish a prima facie case demonstrating their violation of the criminal law. They are seeking here to obtain relief indirectly, through the Chancery Division, through the instrumentality of a pseudo suit for specific performance and an injunction, which they cannot obtain directly through a motion to suppress in the Law Division.

The mere fact that the law of evidence permits the admission of the exhibits here involved, and makes plaintiffs' objection thereto, or motion to suppress futile, is insufficient to force a conclusion that there is no adequate remedy at law. The real purpose of this action is to circumvent the laws of evidence in this State. *Linn v. Neldon's Administrator*, 23 N. J. Eq. 169 (Ch. 1872); *Hoffman v. Malonatsky*, 112 N. J. Eq. 333 (E. & A. 1933).

Ordinarily and normally an injunction does not lie against a threatened act merely because it is illegal or transcends the constitutional power if it does not inflict irreparable injury upon the plaintiff. *United Fuel Gas Co. v. Railroad Commission*, 278 U. S. 300, 73 L. ed. 390 (1929); *Terrace v. Thompson*, 263 U. S. 197, 68 L. ed. 255 (1923); *State Corp. Commission v. Wichita Gas Co.*, 290 U. S. 561, 78 L. Ed. 500 (1934).

The plaintiffs must show not only that the act complained of is unconstitutional but that it will inflict an

irreparable or irremediable injury. *Newtex S. S. Corp. v. United States*, 107 Fed. Supp. 388 (U. S. Dist. Ct. 1952).

Generally, courts of equity should not interfere with criminal prosecutions save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent, and then generally only where property rights are involved. *Bantam Books, Inc. v. Melko*, 25 N. J. Super. 292 (Ch. 1953), modified 14 N. J. 524 (1954); *Higgins v. Krogman*, 140 N. J. Eq. 518 (Ch. 1947), affirmed 142 N. J. Eq. 691 (E. & A. 1948) *Stefanelli v. Minard*, supra.

No such irreparable injury, clear and imminent, is here present, unless it could be found in the possible conviction of the plaintiffs by use of the seized articles.

All of the cases cited by plaintiffs for the proposition that:

> "Of all the rights of the citizens, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves not merely protection of his person from assault, but exemption of his private affairs, books and papers from the inspection and scrutiny of others. Without the enjoyment of this right all other rights would lose half their value." Page 390 of 104 N. J. Eq.

*In re Pacific Railway Commission*, 32 Fed. Rep. 241, were concerned with acts not yet accomplished. They concerned themselves with intended and threatened constitutional violations and not with accomplished acts. We have no dispute with the principles as outlined but they are inapplicable to the facts sub judice. The damage there contemplated could conceivably have been irreparable and irremedial. No irreparable or irremedial damage as here used has been shown by the plaintiffs.

Even though we should concede, for the sake of argument, that the violation of the constitutional guarantees

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causes irreparable and imminent damage to plaintiffs, this court should refuse to act.

The remedy of specific performance is not a matter of strict right but rather one of sound judicial discretion. In *Gulvin v. Sunshine Park, Inc.*, 137 N. J. Eq. 249 (E. & A. 1945), the court said:

> "The remedy is granted or denied as the justice and right of the particular case shall seem to the court to require upon the full consideration of the rights and equities of the respective parties."

See also *N. J. Highway Authority v. Renner*, 18 N. J. 485 (1955).

The doctrine under which evidence obtained by illegal seizure through the instrumentality of an illegal search, as a result of decisional authority, has assumed the proportions of public policy. *State v. Alexander*, supra. Mr. Justice Cardozo, while sitting in the Court of Appeals in New York, in *People v. Defore*, 242 N. Y. 13, 150 N. E. 585 (1926), very ably and aptly discussed the policy behind the admission of evidence obtained as above set forth and, in part, said as follows:

> "Other sanctions, penal and disciplinary, supplementing the right to damages, have already been enumerated. No doubt the protection of the statute would be greater from the point of view of the individual whose privacy had been invaded if the government were required to ignore what it had learned through the invasion. The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office. There are dangers in any choice. The rule of the *Adams* case strikes a balance between opposing in-

terests. We must hold it to be the law until those organs of government by which a change of public policy is normally effected shall give notice to the courts that the change has come to pass."

The Legislature is presumed to know the common law of the State. *Yanow v. Seven Oaks Park, Inc.*, 14 N. J. 341 (1953); *Magierowski v. Buckley*, 39 N. J. Super. 534 (App. Div. 1956).

It does not behoove this court, in any event, to reverse, by an indirect means, the public policy of this State, which has been acquiesced in by the affirmative action of its highest court and by the inaction of the Legislature. The question of whether this policy should be reversed is one which should be left to our Legislature or to our highest court. *Wolf v. Colorado*, supra; *State v. Alexander*, supra.

Judgment will be entered accordingly for the defendants.

Decided: December 26, 1956.

## ORDER TO DISMISS AND FOR SUMMARY JUDGMENT FOR THE DEFENDANTS
(filed 2/4/57)

The matter being opened to the Court by Deputy Attorney General Stanley Cohen, attorney for the defendants, and in the presence of James M. Davis, Jr., Esq., a member of the firm of Powell and Davis, Esqs., attorneys for the plaintiffs, and it appearing to the Court that the complaint filed herein fails to state claims upon which relief can be granted and that there is no genuine issue as to any material fact;

It is on this 4th day of February, 1957, ORDERED that judgment be entered in favor of the defendants, Grover C. Richman, Jr., Attorney General of New Jersey and Martin J. Queenan, County Prosecutor of Burlington County, and against the plaintiffs, Harry Eleuteri and Edward Danley, with costs to be taxed.

Vincent S. Haneman /s/
J. S. C.

I approve the form of the within Order

POWELL AND DAVIS
Attorneys for Plaintiffs

By James M. Davis, Jr. /s/
James M. Davis, Jr.
A Member of the Firm.

## OPINION

The opinion of the court was delivered by

CONFORD, J. A. D.

The Plaintiffs brought this action in the Chancery Division to obtain equitable relief against the defendants in respect of the prospective use against them, in the trial of pending indictments for bookmaking, of certain money and property obtained by the State as a result of assertedly illegal searches of their homes. From a summary judgment in favor of defendants, 43 *N. J. Super.* 303 (*Ch. Div.* 1956), plaintiffs bring this appeal.

At the argument of the motion for summary judgment leave was granted to plaintiffs to file, for the record, an amended complaint to cover certain factual contentions inadvertently omitted from the complaint, but included within the scope of the argument on the motion. In essence, the amended complaint sets forth the following grievances. As to the plaintiff, Eleuteri, it is charged that one George Dann, a trooper in the State Police, subordinate to and under the control of the defendant, Attorney General Richman, on August 22, 1954 searched plaintiff's "premises" at 134 Second Street in the City of Bordentown and took and carried away "papers, money and property" belonging to him and that the search and seizure was illegal and unreasonable, in violation of specified provisions of the New Jersey and United States Constitutions in the respects: (a) that the only authorization for the search was a search warrant issued by the magistrate of the Municipal Court of the Township of Chesterfield, which was without jurisdiction in the City of Bordentown, and (b) that the warrant did not "particularly" describe the papers and things to be seized; that as a result of the said search the predecessor of the defendant, Prosecutor Queenan of Burlington County, procured an indictment of plaintiff, charging him with what is commonly known as bookmaking and possession of lottery policy slips, both constituting statutory

criminal offenses, and that the said defendant holds the papers and property so seized for use at the trial of the plaintiff, being dependent thereon to establish a *prima facie* case against him; that both defendants are sworn to uphold the Constitutions both of New Jersey and of the United States; that the New Jersey courts of law, as distinguished from the courts of equity, have so construed Article 1, paragraph 7, of the New Jersey Constitution of 1947, securing the people from unreasonable search and seizure, and its predecessor provision under the Constitution of 1844, as to deny the people the right to be "secure" in the sense intended by the Constitution of New Jersey and by the Fourth Amendment of the United States Constitution, the benefits of which extend to the citizen as against state action by virtue of the Fourteenth Amendment of the Unites States Constitution, particularly in that they have permitted papers and effects of citizens unauthorizedly searched and seized to be exposed to public view and used as evidence in the prosecution of such citizens for crime and have refused to suppress such papers and effects and return them to their owners notwithstanding that the search and seizure was illegal; that because of the "uniform and well established construction" of the Constitutions in the manner stated, the State of New Jersey and its law enforcement officers, including the defendants, have "affirmatively sanctioned, practiced and encouraged" unlawful police incursion into the privacy of citizens and that defendants have "encouraged" their subordinates to take advantage of unconstitutional searches; that the search of plaintiff's home was "part and parcel" of that illegal policy of the State of New Jersey; and that the remedy afforded by the New Jersey law courts for illegal or unconstitutional searches is an action for damages, which is inadequate and will not compensate plaintiff for being convicted of crime as a result of evidence obtained in violation of his constitutional rights. Wherefore the complaint of the plaintiff, Eleuteri, sought judgment declaring the

search illegal and the retention by defendants of the papers and effects seized to constitute a continuing unconstitutional seizure of his property; requiring defendants to return the property to the plaintiff or to deliver it to the court "for destruction"; and enjoining defendants from offering any of the effects in evidence at the trial of the indictments and from any further unconstitutional searches of plaintiff's premises, and any further "sanctioning in an affirmative way police incursion into the privacy of the plaintiff and the other citizens of the State of New Jersey."

As to the plaintiff, Danley, the complaint follows the same pattern except that the premises searched in this case were situated at 52 East Main Street in the Village of Columbus, Township of Mansfield, and the illegality charged, in addition to the jurisdictional and other defects in the warrant asserted on behalf of plaintiff, Eleuteri, includes the specification that the warrant authorized a search of Number 54, rather than 52, East Main Street.

On the present appeal defendants do not argue, as they did below, their ground of motion that the defendant, Richman, may not be sued in his capacity as Attorney General. Their basic position is relatively simple. Conceding that the search warrants were illegal, at least insofar as the issuing magistrate was without jurisdiction to issue a warrant for a search in a territorial area beyond that of his municipal court, they contend that, stripped of its pretenses, the present action is designed solely to preclude the use against plaintiffs in their forthcoming criminal trials of the evidence discovered in the course of the searches, but that the decided cases of our courts have repeatedly held that, notwithstanding the illegality of a search, the evidence found is immune from any process to return it pending trial of a criminal charge wherein it is relevant and material *per se* upon the issue of defendants' guilt, and is receivable in evidence on

that issue at the trial without regard to the illegality of the search. They argue that these rules of law constitute settled state-policy, not to be circumvented by such an action as this; that plaintiffs' sole remedy is by civil action against the officers who have contravened the Constitution; and that the use by either defendant of the evidence in question in the pending prosecutions will not violate his oath of office. They deny any affirmative state policy for illegal searches and seizures. They further contend that settled principles of equity jurisprudence, particularly in respect of the enjoining of a criminal prosecution, preclude the grant of equitable relief.

I.

Before undertaking a consideration of the principal issues presented, two subsidiary questions require notice: (a) the adequacy of the legal remedies which the trial court held plaintiffs possessed; (b) whether the items of property are precluded from repossession by plaintiffs because contraband. To some extent these matters are related.

The trial court held that actions would lie either for replevin or for trespass against the officers who conducted the illegal search. The existence of a theoretical remedy for damages as for trespass is undeniable. See *Fennemore v. Armstrong*, 29 *Del.* 35, 96 Atl. 204 (Super. Ct. 1915); *Simpson v. McCaffrey*, 13 *Ohio* 508 (Sup. Ct. 1844); *Gamble v. Keyes*, 35 *S. D.* 644, 153 N. W. 888 (Sup. Ct. 1915); 79 *C. J. S., Searches and Seizures*, § 101, p. 919; cf. *Hebrew v. Pulis*, 73 N. J. L. 621, 625 (E. & A. 1906). But the availability of such an action, apart from the matter of the unlikelihood of substantial damages in such a case as this, particularly if the plaintiffs are convicted of gambling, begs the question which this action poses, i. e., the alleged right of

plaintiffs to have specific enforcement of the security against illegal searches vouchafed them by the constitutional provisions in the form of a judgment ordering a return of the property in order to prevent defendants from effecting what plaintiffs conceive is a continuing breach of those provisions through the holding and prospective use of the property to convict plaintiffs of a crime. If plaintiffs' constitutional grievances are as broad as they claim and if nothing short of a grant of their prayer for relief will vindicate them, a judgment for damages will not adequately compensate them.

As to replevin, the availability of an action of that nature is far from clear. The record before us does not reveal the precise character of the property seized. But if, as may be inferred, it was gambling paraphernalia or property used in the furtherance of gambling, the statute forbids its deliverance out of the hands of the authorities pending the outcome of criminal proceedings. *N. J. S.* 2A:152-6, 7; *Spagnuolo v. Bonnet*, 16 N. J. 546, 558 (1954). Even if it was not contraband, there is authority to the effect that property held by the State as evidence for use in a criminal trial is not subject to replevin or to an action of that purport or effect. 46 *Am. Jur., Replevin*, § 46, p. 30. The question, however, frequently is confused with the meritorious issue before us here, i.e., the effect of the fact that the property was obtained from the owner-suspect by an unconstitutional search and seizure upon its admissibility in evidence in criminal proceedings. *Ibidem*. We conceive that the interests of substantial justice and of an expeditious determination of this controversy call for our consideration of the matter before us on the merits of the important constitutional questions raised rather than to permit procedural incidents to divert us from that course. *N. J. Const.* (1947), Art. VI, Sec. 3, par. 4; *O'Neill v. Vreeland*, 6 N. J. 158 (1951); *Tumarkin v. Friedman*, 17 N. J. Super. 20 (App. Div. 1951), certif. denied, 9 N. J. 287 (1952).

*Opinion*

## II.

Although it is obvious from plaintiffs' argument that they have instituted this action in the Chancery Division in the belief that a more hospitable forum would there be found for the plea that restitution of the papers and property seized is an inseparable incident of their right to be secure against unreasonable search and seizure and that retention of the papers and property by defendants is violative of their obligation to uphold the federal and state constitutions, we conceive that plaintiffs' real and underlying contention is that the rules heretofore applied by our criminal courts concerning the right of the State to retain and use in a prosecution of its owner any property evidential of his guilt, notwithstanding its discovery and seizure as the result of an unconstitutional search and seizure, should now be re-examined and repudiated. The precise position taken appears to concede that, as a technical rule of evidence, once trial of an indictment is under way, the questionable data is admissible regardless of the illegality of its procurement, but that it ought to be possible to forestall this result by suitable proceedings in advance of trial to suppress the data. This would eliminate the objection of delaying the trial by introduction of a collateral issue and yet restore the victim of the illegal search to his security-status with respect to the data as of prior to the search. Plaintiffs conceive that unless they can have this relief at the hands of some tribunal, they have been denied the essence of the security from unreasonable search guaranteed them by Article I, paragraph 7 of the New Jersey Constitution, and by the Fourth Amendment of the United States Constitution, made applicable to State action by the Fourteenth Amendment.

As an intermediate appellate tribunal we are first faced with the question as to whether these inquiries have not been resolved by the courts of last resort of

this State and therefore concluded as far as this court is concerned. With respect to the evidence rule there is no doubt that the matter was settled long ago by the Court of Errors and Appeals adversely to the plaintiffs' position. *State v. Lyons*, 99 N. J. L. 301 (E. & A. 1923); *State v. Merra*, 103 N. J. L. 361 (E. & A. 1927); *State v. Cortese*, 104 N. J. L. 447 (E. & A. 1927), affirming 4 N. J. Misc. 683 (Sup. Ct. 1926); *State v. Guida*, 119 N. J. L. 464 (E. & A. 1938), affirming 118 N. J. L. 289 (Sup. Ct. 1937). If evidential *per se*, i.e., if "material and competent" when "we leave out of consideration the manner in which the State obtained the papers," they are admissible in evidence. See *State v. Pinsky*, 6 N. J. Super. 90, 94 (App. Div. 1950). A number of former Supreme Court decisions are in accord. And it hardly matters now that most of these cases rely upon *State v. MacQueen*, 69 N. J. L. 522 (Sup. Ct. 1903), which expressly refused to decide the question because it had not been raised below (at p. 528). Neither the Court of Errors and Appeals nor the present Supreme Court, however, has ever passed directly on the question as to whether illegally procured evidence is required to be returned to its owner upon demand in advance of a criminal trial. Our former court of last resort had two opportunities to do so, the question having been raised in *State v. Mausert*, 88 N. J. L. 286 (E. & A. 1915), and in *State v. Giberson*, 99 N. J. L. 85 (E. & A. 1923). In both instances the court preferred to remain silent, the *Mausert* case going off on a holding that the seizure was the incident of a lawful arrest and the *Giberson* ruling being predicated upon consent to the search by the defendant. A strongly stated *dictum* in support of the right to pretrial return of such property was uttered by the Middlesex Court of Oyer and Terminer in *State v. Condon*, 40 N. J. L. J. 293 (1917). The former Supreme Court, however, has held that a motion to return illegally seized evidence would be unavailing, the decision relying upon the cases

on admissibility of the evidence at trial. *State v. First Criminal Judicial Dist. Court, Bergen Co.*, 10 N. J. Misc. 715, 160 Atl. 672 (Sup. Ct. 1932). The point was given extended consideration in the former Essex County Court of Quarter Sessions in *State v. Black*, 5 N. J. Misc. 48, 55, 135 Atl. 685 (1926), where it was concluded that a pretrial motion for the return of illegally seized evidence would "conflict" with the cases rejecting the exclusionary rule and that the practice was unauthorized.

The same question reappeared in *In re 301-317 Clinton Avenue*, 35 N. J Super. 136 (Co. Ct. 1955). There a search warrant which had been executed by a state trooper acting as an agent of the Law Enforcement Council, resulting in the seizure of property contended by the State to have been used in the conduct of a lottery, was sought to be quashed on a motion before trial of a criminal prosecution on the ground, among others, that while assigned to the Law Enforcement Council the trooper was under a disability to execute a search warrant. The County Court agreed the warrant was illegally executed but denied the motion to quash on the authority of *State v. Black, supra*, relying also upon *State v. Cicenia*, 6 N. J. 296 (1951), where it was held that the criminal procedure rules did not authorize a motion in advance of trial to suppress a confession. When the case reached the Supreme Court, *sub nomine Application of Berlin*, 19 N. J. 522 (1955), it was held that the execution of the warrant and all other attendant incidents of the search and seizure were legally unexceptionable, and the court then stated, significantly (at p. 531):

> "In this view it is unnecessary to determine the asserted right to a return of the goods taken where the search warrant is quashed for invalidity."

Since the point referred to could have been dispatched by a reference to the earlier authorities holding against

the right of return of the goods, we are of the view that the foregoing disposition constitutes a pointed indication by our highest court that the question as to the right to a pretrial return of unconstitutionally seized property (or to suppression as evidence if the property is contraband) is open for adjudication. That assumption is nourished by the fact that in the course of the *Berlin* opinion (p. 527) the court cites *State v. Alexander*, 7 N. J. 585 (1951), which, by thoroughly considered *dictum*, reaffirms the non-exclusionary rule (at pp. 593-595). (See the discussion of the *Alexander* case, *infra*.) See also *State v. Pinsky*, *supra*.

An approach to the question left open in *Application of Berlin* can be logically undertaken from two points of view: first, by an examination of the wisdom and justification for a procedural rule which would permit an application by the victim of an illegal search to have his property returned if made prior to trial, but otherwise adhering to the present rule of admissibility (which, with some qualifications, is the federal rule; *Fed. R. of Crim. Pro.* 41(e)); second, by a newappraisal of the merits of the exclusionary rule. It is, however, difficult to exclude reflection upon the merits of that rule in deliberation over the adoption of the pretrial motion technique, since the policy of exclusion is necessarily implicated, at least indirectly, even in that procedural device. Moreover, the state courts have been practically invited by the United States Supreme Court, since the rendition of the opinion in the *Alexander* case, to reconsider the doctrine of non-exclusion in the light of the consideration that in *Wolf v. Colorado*, 338 U. S. 25 (1949), that court held, for the first time, that the "security of one's privacy against arbitrary intrusion by the police" (p. 27) is embodied in the concept of due process found in the Fourteenth Amendment, but that, nevertheless, it was for the states to decide for themselves whether the vindication of the right required the rule of exclusion of ille-

gally secured evidence at a criminal trial, a rule which the federal courts deem necessary for that purpose in federal prosecutions. *Irvine v. California*, 347, U. S. 128, 134 (1953).

The underlying problem seems to us to grow out of the commonly encountered phenomenon in social psychology that basic rights for the protection of individuals from governmental abuse erected in a distant age when the evil was present and grievous tend to depreciate in the community value-judgment at a later time when the evil slumbers and asylum within the protective rule is most frequently sought by criminals.

The Fourth Amendment of the United States Constitution states:

> "The right of the people to be *secure* in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (Emphasis supplied.)

This, as well as the other of the first ten amendments, was adopted at the outset of our federal system as a restriction of the federal government against abuse of the individual. A practically identical provision was incorporated in the New Jersey Constitution of 1844, Article I, paragraph 6, and readopted in the Consitution of 1947, Article I, paragraph 7.

The inclusion of the Fourth Amendment in the federal Bill of Rights was a direct response to the invasion and ransacking of private homes under governmental authority both in England and in the Colonies. In the mother country the hateful instrumentality was the general warrant, designed principally to uncover evidence of criminal political libel, *Entick v. Carrington* (1765), 19

*Howell's State Trials* 1029. In the Colonies the stimulus was the writs of assistance under which Crown customs officers invaded private homes for the purpose, real or pretended, of searching for smuggled goods. See *Boyd v. United States*, 116 U. S. 616, 625-627 (1886); 1 *Cooley's Constitutional Limitations* (8th ed. 1927), p. 610, et seq.; *Haines, "Evidence Obtained by Illegal Search and Seizure,"* 19 Ill. L. Rev. 303, 304-305 (1925); *Rudd, "Present Significance of Constitutional Guaranties against Unreasonable Searches and Seizures,"* 18 U. of Cinc. L. Rev. 387, 391 (1949). There is no lack of judicial language recognizing this right as one of the most basic constitutional protections of the individual against government. It has been described as being "of the very essence of constitutional liberty," *Gouled v. United States*, 255 U. S. 298, 304 (1921). The deliverance by Mr. Justice Frankfurter in *Wolf v. Colorado, supra*, though refusing to embrace the exclusionary rule as an essential of due process, nevertheless said (338 U. S., at pp. 27, 28):

> "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples."

Dissenting in *Harris v. United States*, 331 U. S. 145, 163 (1947), the same jurist described the Fourth Amendment as taking "a place second to none in the Bill of

Rights" and to be "central to the enjoyment of the other guarantees."

In the light of these expressions and the background and language of the constitutional provisions, it is difficult to repel the natural logic of the idea that restoration to the owner of that which was unconstitutionally taken from him by the authorities is of the very fabric of the security from unreasonable search and seizure ostensibly given him by the Constitutions. Granted that the unlawful breach of his privacy is complete when perpetrated, and, in that sense, irreparable, the restoration to him of property that was in his private possession and security until the illegal act wrested it from him is at lease a partial restoration of his *status quo ante*. If it be said that when the seizure discloses evidence of the commission of crime it evokes the concomitant need for retention of the property as evidence to vindicate society's interest in punishment of the crime, the obvious answer is that the very philosophy underlying the formulation and adoption of the protection in the first place envisaged that it would shelter those despoiled of privacy in the name of law enforcement (smuggling, sedition, criminal libel, etc.). To justify retention of the fruits of the illegal search by the *post facto* demonstration of criminality in a particular case is, therefore, not only to blink at the logic of history, but also necessarily to corrode the right in the hands of an innocent; for he may be the victim of suspicion, real or fancied, which the police will be tempted to investigate by illegal search, when it is inconvenient or impossible to comply with the Constitution, if they know that the fortuitous discovery of evidence of crime thereby will automatically validate its retention and use against the subject. A fruitless violation leaves the innocent victim to the sorry remedy of an action for damages. See *Irvine v. California, supra* (347 U. S., at p. 137). As was stated for the Supreme Court in *McDonald v. United States*, 335 U. S. 451, 453 (1948),

ordering the suppression of evidence illegally taken from a professional gambler:

> "This guarantee of protection against unreasonable searches and seizures extends to the innocent and guilty alike,"

and, at p. 455:

> "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was not done to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law."

That a degree of shelter of the guilty is an inescapable consequence if the constitutional safeguard is to have any effectiveness as a protection of all the citizenry, has been repeatedly recognized. *Trupiana v. United States*, 334 U. S. 699, 710 (1948); *Go-Bart Importing Co. v. U. S.*, 282 U. S. 344, 357 (1931); *Byars v. U. S.*, 273 U. S. 28, 29 (1927).

In *Weeks v. United States*, 232 U. S. 383 (1914), the Supreme Court was for the first time confronted with the question as to whether a pretrial demand by a person charged with crime for the return of unconstitutionally seized property was required to be honored as an incident of his rights under the Fourth Amendment. The decision was in the affirmative, the court declaring that otherwise the Fourth Amendment "is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution" (p. 393). *Cf. Adams v. New York*, 192 U. S. 585 (1904), affirming *People v. Adams*, 176 N. Y. 351, 68 N. E. 636 (Ct. App. 1903), which was distinguished in the *Weeks* case on the ground

that in *Adams* there was no objection by defendant to the manner in which the evidence was secured until trial. The *Weeks* decision was foreshadowed in *Boyd v. United States, supra,* sustaining the principle of exclusion, but there actually applied to a situation more assimilable to the protections of the Fifth Amendment. After *Weeks* and until the ambivalent opinion of the court majority in *Wolf v. Colorado, supra,* the attitude of the Court continued to be that the Fourth Amendment was in essence "a provision forbidding the acquisition of evidence in a certain way," *Silverthorne Lumber Co. v. United States,* 251 U. S. 385, 392 (1920). Whereas in the *Weeks* case the Court found that the refusal of restitution of the illegally seized property constituted "a denial of the constitutional rights of the accused" (232 U. S., at p. 398), there was hesitation "to treat this remedy (exclusion of evidence) as an essential ingredient of the right," when, 35 years later, in the *Wolf* case, *supra,* the Court was asked to compel the states to apply the exclusionary rule as a matter of due process (338 U. S., at p. 29). See Frank, "Review and Basic Liberties," in *Supreme Court and Supreme Law (Cahn ed.* 1954), pp. 109, 139; Comment: 35 *Cornell L. Q.* 625 (1950); Allen, "The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties," 45 *Ill. L. Rev.* 1 (1950).

Thus, while the United States Supreme Court will not compel them to do it (but see *Rochin v. California,* 342 U. S. 165 (1952)), the courts of the several states are left to determine independently whether history, language and reason do not show that the Fourteenth Amendment and their own constitutional provisions require the suppression as evidence of illegally secured property, no matter how incriminating.

A recent tabulation of the judicial jurisdictions shows that 25 states (including New Jersey), England and Canada follow the so-called common-law rule of admission, and generally without regard to the making of a

pretrial motion for suppression, while 21 states and the District of Columbia apply the exclusionary rule. *Annot.*, 50 *A. L. R.* 2d 531, 535-536 (1956). It may be of significance that since the decision in the *Wolf* case the trend has been toward the exclusionary rule, two states switching their positions in that direction by legislation, 1C *North Carolina Gen. Stat.*, §§ 15-27; 2 *Texas Code of Crim. Proc., Art.* 727a, and two others by judicial decision, *Rickards v. State*, 45 Del. 573, 77 A. 2d 199 (Sup. Ct. 1950); *People v. Cahan*, 44 Cal. 2d 434, 282 P. 2d 905 (Sup. Ct. 1955). Rhode Island, previously uncommitted, has by statute adopted the rule of exclusion. *Acts and Resolves*, 1955, c. 3590, § 16, p. 565. See *Note*, 30 *St. John's L. Rev.* 236, 247 (1956); cf. Cowen, "The Admission of Evidence Procured Through Illegal Searches and Seizures in British Commonwealth Jurisdictions," 5 *Vand. L. Rev.* 523 (1952).

Learned debate of the merits of the question, though profuse, is more often attuned to considerations relating to consequences of the alternative rules upon law enforcement than upon the effectuation of the civil liberties involved. Bibliographical collections *pro* and *con* are to be found in Comment, "Judicial Control of Illegal Search and Seizure," 58 *Yale L. J.* 144, 151, n. 32 (1948), and Note, 56 *Col. L. Rev.* 940, 941, n. 13 (1956), as well as in other papers cited elsewhere in this opinion. No adequate empirical studies have been made to afford a reliable answer to the question as to whether one alternative rather than the other leads to better observance of the constitutional guaranties, or, for that matter, to more effective law enforcement. See Comment, "Search and Seizure in Illinois: Enforcement of the Constitutional Right of Privacy," 47 *N. W. U. L. Rev.* 493 (1952); Allen, *op. cit., supra* (45 *Ill. L. Rev.*, at 16-17); Barrett, "Exclusion of Evidence Obtained by Illegal Searches—Comment on *People v. Cahan*," 43 *Cal. L. Rev.* 565, 583-592 (1955); Mr. Justice Murphy,

dissenting, in *Wolf v. Colorado, supra* (338 U. S., at pp. 44-46).

As to the practical uselessness of such sanctions against illegal searches as the civil actions for damages or theoretical criminal liability of the offending officer there is no responsible dissent. See Comment, 58 *Yale L. J., supra,* at p. 151. But see Blumrosen, "Contempt of Court and Unlawful Police Action," 11 *Rutgers L. Rev.* 526 (1957). Notwithstanding this truism, the most frequently stated argument against the exclusionary rule is the indictment that the rule lets go free both the law-breaking official and the criminal he subjects to illegal search and seizure. See 8 *Wigmore on Evidence* (3rd ed., 1940), § 2184, p. 40; Cardozo, J., in *People v. Defore,* 242 N. Y. 13, 150 N. E. 585 (Ct. App. 1926). In the latter ruling, impelled primarily by the earlier decision in *People v. Adams, supra,* the issue is posed (150 N. E., at p. 589): "The question is whether protection for the individual would not be gained at a disproportionate loss of protection for society. On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office." Though felicitously phrased, this hardly assays the weight in the balance of the constitutional protection involved. It is not merely a need to repress insolent officials but effectively to vindicate a basic freedom. The decision to accommodate methods for catching criminals to a reasonable degree of security for the privacy of the individual was made by the constitutional framers, and it ought to control those vested with the responsibility of upholding that decision while it remains the law of the land, whatever their private misgivings as to its merits. We have already shown that the fact that rigorous enforcement of the Constitution means some impairment of the sanctions for criminal law observance is implicit in the policy-judgment represented by the very adoption of the constitutional provision.

Therefore, to give it lukewarm enforcement because of fear of the effect of rigorous enforcement upon the general repression of crime seems indefensible. The logic of the exclusionary rule was expressed by Judge Learned Hand in *Connolly v. Medalie*, 58 F. 2d 629, 630 (2d Cir. 1932):

> "The power to suppress the use of evidence unlawfully obtained is a corollary of the power to regain it. The prosecution is forbidden to profit by a wrong whose remedies are inadequate for the injury, unless they include protection against any use of the property seized as a means of conviction."

The validity of this philosophy led a majority of the California Supreme Court in the *Cahan* case, *supra*, recently to deliberately turn about and adopt the exclusionary rule, finding that "other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers" (282 P. 2d at p. 911). In the same general tenor are the discussions in Comment, 58 *Yale L. J.*, *supra*, at p. 152; Allen, *op. cit.*, *supra* (45 *Ill. L. Rev.*, at p. 17); Chafee, "The Progress of the Law," 35 *Harv. L. Rev.* 673, 694 (1922); Carroll, "The Search and Seizure Provisions of the Federal and State Constitutions," 10 *Va. L. Rev.* 124 (1923); Rudd, *op. cit.*, *supra*; Atkinson, "Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures," 25 *Col. L. Rev.* 11, 24 (1925); Hall, "Police and Law in a Democratic Society," 28 *Ind. L. J.* 133, 172-175 (1953).

Adherence to the rule of admissibility has led many to question "the extent to which justice under law is accepted as a guide to conduct" in criminal administration, 291 *Annals of The American Academy of Political and Social Science*, 1, 3 (1954); *American Bar Foundation, The Administration of Criminal Justice in the United States*, Plan for Survey (1955), pp. 124-5. Mr. Justice Brandeis in his dissenting opinion in *Olmstead v. United*

*States*, 277 U. S. 438, 485 (1928) (concerning the use of evidence procured through wiretapping), stated that:

> "If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."

In the same case, Mr. Justice Holmes expressed the view that (at p. 470):

> "It is desirable that criminals should be detected, and to that end all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. * * * We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part."

The common aphorism that the exclusionary rule means both the law-breaking officer and the law-breaking suspect escape cannot withstand analysis. Of course, the rule has nothing to do with the practical impunity of the officer guilty of unreasonable search and seizure. That remains a cold fact, whatever the rule as to return or exclusion of evidence. The absolutism in the other half of the cliche has hardly more to commend it. There are few situations where the apprehension of a criminal suspect is prevented by adherence to the constitution by the police. It is settled that search warrants are required only where "reasonably practicable," see *Trupiano v. United States*, *supra* (334 U. S., at p. 705), not, for example, where the place to be searched is a vehicle which can

easily get away, *Carroll v. United States*, 267 U. S. 132, 156 (1924). A warrant will issue when there are "reasonable grounds for suspicion, supported by circumstances sufficiently strong in themselves to warrant an ordinarily cautious man in the belief that the accused is guilty of the offense with which he is charged." *Application of Berlin, supra* (19 N. J., at p. 527). Moreover, it is only "unreasonable" searches that the Constitutions prohibit. There is always a right of search and seizure by the police without a warrant when incidental to a lawful arrest. *State v. Mausert, supra; Agnello v. United States*, 269 U. S. 20 (1925); *United States v. Rabinowitz*, 339 U. S. 56 (1950). Moreover, the right of search incidental to a valid arrest of an individual includes not only his person but the premises under his control "in order to find and seize things connected with the crime as its fruits or as the means by which it was committed." (*Ibid.*, p. 61.) "Some flexibility will be accorded law officers engaged in daily battle with criminals for whose restraints criminal laws are essential." (*Ibid.*, p. 65.) See also *Application of Berlin, supra* (19 N. J., at p. 527); *Lane v. Pennsylvania R. Co.*, 78 N. J. L. 672, 674 (E. & A. 1910). In view of this practical approach to the law enforcement problem by the court which is the most authoritative exponent of the view that preservation of the Fourth Amendment requires suppression of evidence obtained in violation of its provisions, can it fairly be said that the upholding of that view is to be equated with a crippling of law enforcement? At least to such a degree as to warrant the continued practical emasculation of so vital bulwark of constitutional liberty of the individual? It may be significant that the Federal Bureau of Investigation has not found the exclusionary rule incompatible with good law enforcement.

The Supreme Court of the United States has in a series of recent cases given practical demonstration of the discharge of the most fundamental duty of the judiciary—the

solicitous preservation of the historic protections of the individual embedded in the Bill of Rights—notwithstanding strong dissent from a substantial segment of public opinion. *Slochower v. Board of Education*, 350 U. S. 551 (1956); *Sweezy v. State of New Hampshire*, 352 U. S. 812 (1957); *Watkins v. United States*, 352 U. S. 822 (1957); *Yates v. Washington*, 352 U. S. 896 (1957); *Mallory v. United States* 352 U. S. 877 (1957); *Jencks v. United States*, 353 U. S. 657 (1957). Our State Supreme Court has been equally vigilant a guardian of the constitutional rights of the individual against governmental authority, no matter how unpopular his views or demeaning his record. See *Laba v. Newark Board of Education*, 23 N. J. 364, 377, 378 (1957); *Imbrie v. Marsh*, 3 N. J. 578 (1950); *State v. Widgley*, 15 N. J. 574 (1954). In the last case (p. 579) Mr. Justice Brennan repeated the language of Mr. Justice Heher in *State v. Di Giosa*, 3 N. J. 413, 421 (1950), referring to an argument against recognizing a plea of *autrefois acquit* because the defendant would escape just punishment:

> "Such occasional failures of justice are outweighed by the general personal security afforded by the great principle of freedom from double jeopardy. Such misadventures are the price of individual protection against arbitrary power."

At the outset of his opinion in *State v. Orecchio*, 16 N. J. 125, 129 (1954), Mr. Justice Jacobs reflected the present day hegemony of constitutional rights over punishment for crime in our jurisprudential philosophy:

> "The sound administration of criminal justice in our democracy requires that both the end and the means shall be just. The accused, no matter how abhorrent the offense charged nor how seemingly evident the guilt, is entitled to a fair trial surrounded by the substantive and procedural safeguards which have stood for centuries as bulwarks of liberty in English speaking countries."

## III.

It is the considered view of this bench that for the reasons set forth above both the vindication in a particular case of the constitutional rights of the subject of the illegal search and the prospective protection of the right of privacy of citizens, generally, require the sanction of suppression as evidence of property seized in violation of the constitutional guaranties. There should, moreover, be no differentiation based upon the degree of the violation, if violation there be. See *Boyd v. United States, supra* (116 U. S., at p. 635). But considerations of appropriateness compel us to defer to our highest court for a first instance judicial determination of the question left open in *Application of Berlin, supra*.

Two factors control our attitude. First, in *State v. Alexander, supra,* the court was firm in its declaration, albeit *dictum*; that it had reconsidered the subject but remained unconvinced that the rule of admissibility should be abandoned (7 N. J., at p. 595). While the court was not there specifically concerned with the practice of moving for suppression in advance of trial—the question passed by the court in *Application of Berlin*—the problems are intimately interrelated. *Cf. Greenspan v. State,* 22 N. J. Super. 344, 351 (App. Div. 1952); *Rafferzeder v. Raleigh, etc. Memorial Hospital,* 33 N. J. Super. 19, 23 (App. Div. 1954). Second, an attempt was made to change this rule by an express constitutional provision at the time of the adoption of the 1947 Constitution, I Convention Proceedings Record, pp. 63, 598-608; II, *Ibid*, pp. 1041-2, but the effort was unsuccessful. While this may have reflected the opinion that implementation of the search and seizure provision should be left to the Legislature or the courts, I, *op. cit., supra,* at pp. 603, 606, the result fortifies the view that any change of rule in the present case should be made by the Supreme Court rather than this tribunal.

If the ultimate decision is for suppression of illegally obtained evidence, however, nothing said in *State v. Cicenia, supra,* should bar the way against its procedural implementation. In its passing reference to Rule 41 of the Federal Rules of Criminal Procedure the court was clearly assuming the continued subsistence of a substantive right on the part of the State to use against the criminal defendant the evidence unlawfully taken from him (6 N. J., at pp. 301, 302). "A rule of practice must not be allowed for any technical reason to prevail over a constitutional right," *Gouled v. United States, supra* (255 U. S., at p. 313). A rule of practice can readily be promulgated to conform the procedure with the Constitution, as interpreted.

IV.

If it is the law of this State that a defendant in a criminal prosecution has no right to an order from the court of criminal jurisdiction returning or suppressing as evidence property unconstitutionally taken from him—and we have decided not to hold otherwise in this case—it remains the duty of the defendant law enforcement officers to hold and present the evidence when the case comes to trial. True, as argued by plaintiffs, it is defendants' sworn duty to uphold both State and Federal Constitutions. Any participation, direct or indirect, on their part, in the constitutional transgression here involved would have been a violation of their respective oaths of office. (There is no charge here that there was such participation.) But the present status of the matter is that they are preparing to perform their duty to present evidence of crime in a pending prosecution. That, too, is their constitutional duty. If the case law of this State is to the effect that they cannot be diverted from that course by reason of the taint attending the procurement of the evidence, a contrary result cannot be accomplished in the

name of enforcement of their oaths of office. There are appropriate sanctions for a violation of an oath of office. This action is not one of them.

V.

The allegations in the amended complaint concerning affirmative sanction, practice and encouragement by the State of New Jersey and its officers, including defendants, of unconstitutional searches and seizures, are designed to bring the case within the statement in the opinion of the court in *Wolf v. Colorado, supra,* "that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment" (338 U. S., at p. 28). Neither the complaint nor anything said on behalf of the plaintiffs in the argument supports the thought that their contention is anything more than that the case rule against suppression or exclusion of illegally secured evidence tends to encourage violation of the constitutional guarantee. This is not an affirmative sanction by the State of illegal searches and seizures. There is no suggestion of any concerted, planned or general program by the state low enforcement authorities for disregard of the constitutional requirements for search and seizure. We do not find a grievance grounded in the *Wolf* exception properly invoked by the complaint in this case, because we perceive no genuine factual allegations in the complaint warranting its entertainment, nor do we apprehend that any would be forthcoming were the complaint again amended. *Cf. Di Cristofaro v. Laurel Grove Memorial Park,* 43 N. J. Super. 244 (App. Div. 1957).

VI.

Since the approach taken by the court in this case has turned on the merits of the claim of constitutional infringement, there is no occasion to consider the authorities cited by plaintiffs supporting the concept of equitable jurisdiction to protect the right of privacy. See *Vanderbilt v. Mitchell*, 72 N. J. Eq. 910 (E. & A. 1907); *Brex v. Smith*, 104 N. J. Eq. 386 (Ch. 1929); *McGovern v. Van Riper*, 137 N. J. Eq. 24 (Ch. 1945), affirmed 137 N. J. Eq. 548 (E. & A. 1946). Our decision, technically, sustains the right of the defendants to pursue the course upon which they were embarked when the complaint was filed. As that constituted the furtherance of a criminal prosecution, there comes into play the settled rule that equity will ordinarily refrain from enjoining a criminal prosecution. 4 *Pomeroy, Equity Jurisprudence* (5th ed. 1941), § 1347, p. 949; *Moresh v. O'Regan*, 122 N. J. Eq. 388 (E. & A. 1937); *cf. Bantam Books, Inc. v. Melko*, 25 N. J. Super. 292 (Ch. 1953), modified 14 N. J. 524 (1954).

Judgment affirmed.

## MANDATE ON AFFIRMANCE
(filed 10/9/57)

This cause having been duly argued before this Court by James M. Davis, Jr., counsel for the appellants and David D. Furman, counsel for the respondents, and the Court having considered the same,

It is hereupon ordered and adjudged that the Judgment of February 4, 1957 of the said Superior Court, Chancery Division, is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless a Notice of Appeal to the Supreme Court or a Notice of Petition for Certification has been filed or is pending, or unless otherwise ordered by this Court that the record be remitted to the Superior Court, Chancery Division, to be there proceeded with in accordance with the rules and practice relating to that Court, consistent with the opinion of this Court.

WITNESS the Senior Judge of the Part, Superior Court of New Jersey, Appellate Division, at Trenton on the 9th day of October, 1957.

I. Grant Scott
Clerk of the Superior Court

# NOTICE OF APPEAL

To:

The Honorable Grover C. Richman, Jr.,
Attorney General of New Jersey,
Attorney of the Defendants-Respondents:

PLEASE TAKE NOTICE that Harry Eleuteri and Edward Danley do hereby respectfully appeal from the whole of a judgment of the Superior Court of New Jersey, Appellate Division, entered on October 9, 1957, which affirmed a judgment of the Superior Court of New Jersey, Chancery Division, entered on February 4, 1957, to the Supreme Court of New Jersey.

POWELL AND DAVIS
Attorneys of Plaintiffs-Appellants

By James M. Davis, Jr.
A Member of the Firm

Dated: November 11, 1957.

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FILED
JUL 26 1958
JOHN T. FEY, Clerk

# Supreme Court of the United States

October Term, 1957.

No. 225

HARRY ELEUTERI and EDWARD DANLEY,

*Petitioners,*

*-vs-*

DAVID D. FURMAN, ATTORNEY-GENERAL OF THE STATE OF NEW JERSEY, and MARTIN J. QUEENAN, Burlington County Prosecutor,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

JAMES M. DAVIS JR.
*Attorney of Petitioners*
110 High Street
Mount Holly, New Jersey

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SUPREME COURT OF THE UNITED STATES

October Term, 1957.

No.

HARRY ELEUTERI and EDWARD DANLEY,
*Petitioners,*

*vs.*

DAVID D. FURMAN, Attorney General of the State of New Jersey, and MARTIN J. QUEENAN, Burlington County Prosecutor,
*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The petition of Harry Eleuteri, of 134 Second Street, in the City of Bordentown, and of Edward Danley, of 52 East Main Street, Columbus, in the Township of Mansfield, both in the County of Burlington and State of New Jersey, respectfully shows:

A.

They respectfully seek a writ of certiorari to the Supreme Court of New Jersey which entered a judgment on the opinion of Mr. Chief Justice Weintraub, a copy of which is appended hereto and which is reported in 26 N. J. 506, 141 A. 2d. 46 (1958). The judgment of the Supreme Court of New Jersey affirmed the judgment of the Superior Court of New Jersey entered on the judgment of Judge Conford, which is reported in 47 N. J. Sup. 1, 135 A. 2d 191 (1957) and which is printed in the Appellants' Appendix submitted herewith at page 47a, et seq. The latter judgment affirmed a summary judgment for the defendants entered in the Superior Court of New Jersey on an opinion by Judge Haneman, which is re-

ported in 43 N. J. Sup. 303, 128 A. 2d 743 (1956) and is found also in Appellants' Appendix in the Supreme Court of New Jersey, submitted herewith, at page 36a, et seq.

*B.*

The grounds on which the jurisdiction of this court is invoked are:

In their amended complaint filed in the Chancery Division of the Superior Court of New Jersey, the plaintiffs claimed the immunity from unreasonable searches and seizures, guaranteed to them by the Fourth and Fourteenth Amendments to the Constitution of the United States; they claimed the right under the same amendments to have their property, unlawfully seized, returned to them; and they claimed the right to be relieved of or an immunity against the use by the respondents of their property against the petitioners in the prosecution of criminal indictments by reason of the same amendments in combination with the second and third clauses of Article VI of the Constitution of the United States.

They also claimed the federal right to be protected against unreasonable searches and seizures which were part and parcel of a State-sponsored and sanctioned, but nevertheless unlawful, unwarranted, unjustifiable, and unconstitutional police incursion into their privacy in violation of the Fourteenth Amendment to the Constitution of the United States as construed by 69 Sup. Ct. 1359, 1361 (1949). The court of original jurisdiction denied the relief sought and that result has been affirmed twice, most lately by the Supreme Court of New Jersey.

I. The date and time of entry of the judgment of the Supreme Court of New Jersey, sought to be reviewed is April 28, 1958.

II. No order respecting a rehearing has been sought or allowed. Neither has any order granting an extension of time within which to petition for certiorari been sought or allowed.

III. The statutory provision believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari is 28 United States Code 1257 (3), 28 U. S. C. A. 1257 (3).

C.

The questions presented for review are:

1. If a state officer seeking search warrants made two verified complaints to a magistrate in which he stated that he had "been reliably informed that gaming is taking place" in violation of law in the premises sought to be searched, one of which premises he describes by the wrong street number, and each of which premises he refers to as the residence of John Doe, his complaints making no other description of the persons to be seized and no description of the things to be seized; if the magistrate was lacking jurisdiction to issue the writs prayed for; if there was no statute authorizing the search or seizure; if search warrants issued in conformity with the prayers of the complaints; if searches and seizures of money and papers were made; and if the money and papers so seized are even now retained by state officers, do the searches, seizures, and the retention of the money and papers constitute a violation of the right of security guaranteed by the Fourth Amendment to the Constitution of the United States and a deprivation of liberty or property, or both, without due process of law, forbidden by the Fourteenth Amendment to the Constitution of the United States?

2. If, following the searches and seizures described in question #1, indictments were returned against the plaintiffs, in a state court, charging each of them with the crime of bookmaking; and if the plaintiffs filed complaints in a state court of general jurisdiction against the County Prosecutor and the Attorney General of that state, the latter of whom could at his pleasure assume the prosecution of the indictments; if their complaints charged that searches and seizures of their property took place in violation of the Constitution of the United States as aforesaid, that their property was being held from them by officers subject to

the authority of the defendant, Attorney General, and that the defendants, who had each taken the oath required by Article VI, Clause 3 of the Constitution of the United States, would, unless restrained, offer and use as evidence against the plaintiffs the money and papers seized, the courts of the state following the "non-exclusionary rule" of evidence; and if the complaint sought by way of relief the return to the plaintiffs of their property, or its destruction, or an injunction against its use as evidence in court by the defendants, do the complaints set forth a cause of action under the Fourth and Fourteenth Amendments and Section VI, Clauses 2 and 3 of the Constitution of the United States?

3. If the plaintiffs' said complaints in addition alleged that for many years, in light of the fact that the "non-exclusionary rule of evidence" is followed, that state and its law enforcement officers had affirmatively sanctioned, practiced, and encouraged unlawful, unwarranted, unjustifiable, and unconstitutional police incursion into the privacy of its citizens and that the searches and seizures complained of were part and parcel of this policy, do the complaints state a federally protected cause of action?

*D.*

The constitutional provisions which the case involves are as follows:

Article VI, Clause 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Article VI, Clause 3:

"The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound

by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

Amendment XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

"Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the

United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

"Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

*E.*

**Statement of the Case**

On August 22, 1954, Trooper George Dann, of the New Jersey State Police, executed affidavits or verified complaints before Magistrate Charles C. C. Ellis, of Chesterfield Township, for the purpose of obtaining search warrants to search 134 Second Street, in the City of Bordentown, New Jersey and 54 East Main Street, Columbus (in the Township of Mansfield), New Jersey. These complaints were attached to the complaint filed by the plaintiffs in the Superior Court of New Jersey as Exhibits "A" and "C" respectively and can be found at pages 13a and 16a of the plaintiffs' appendix. They make an attempt to describe the houses to be searched and each of them claims the property to be searched to be in the possession of one John Doe. Trooper Dann in these complaints stated that he had just and reasonable cause to suspect and did suspect and believe that gaming in violation of a New Jersey statute was taking place in each of the said premises and that his

reasons for suspecting and believing so are that he has been reliably informed that gaming is taking place there. He does not attempt to describe either the person or things things to be seized but does pray for a search warrant to search for money, evidence and all other paraphernalia used in connection with gaming on the premises. Magistrate Ellis had no jurisdiction to receive these complaints or issue search warrants to be executed outside of the municipality which he served. Nevertheless he issued search warrants on the same day. Members of the New Jersey State Police executed the warrants except that as to the Mansfield Township warrant, they did not execute that at 54 East Main Street but they entered and searched 52 East Main Street, for which premises they had no search warrant. They seized money and papers of the petitioners, Harry Eleuteri and Edward Danley, which money and papers they have and continue to retain.

Thereafter a Grand Jury empaneled and sworn in the Superior Court of New Jersey in and for the County of Burlington returned an indictment against each of the petitioners charging them with bookmaking in violation of the gambling laws of the State of New Jersey.

The petitioners on March 29, 1956, filed their complaint in the Superior Court of New Jersey, Chancery Division, a copy of which is reproduced commencing at page 2a of the appendix. In their complaint, they charge that the searches and seizures and retention of their papers and money was all done and being done in violation of the Constitution of New Jersey and of the Fourth and Fourteenth Amendments of the Constitution of the United States. They named as defendants, Martin J. Queenan, who was and is the County Prosecutor of Burlington County, and Grover C. Richman, Jr., who was the Attorney General of New Jersey. They further charged that the courts of the State of New Jersey had long ago adopted the so-called "non-exclusionary rule of evidence" in such cases and that the law enforcement officers of the State of New Jersey knowing this, for many years had affirmatively sanctioned, practised and encouraged unlawful, unwarranted, unjustifiable and unconstitutional

police incursion into the privacy of its citizens and that these law enforcement officials including the defendants themselves, encouraged their subordinates to take advantage of unconstitutional and unlawful searches of the persons and property of New Jersey citizens, well knowing that the only remedy available to an injured citizen was an action for damages (P25a, 5-33). The complaint further charged that the searches and seizures perpetrated upon the petitioners here were carried out as part and parcel of that policy (P28a, 20). The complaints further alleged that the defendant, Queenan, or the defendant, Richman, plan to undertake the prosecution of the indictments against the petitioners and that the defendant, Richman, was the governmental superior of those very officers who were in possession of the plaintiffs' property seized and retained as aforesaid. They sought a declaration of their rights, an accounting and return of their property or the destruction thereof by the court if it should be declared to be contraband and an injunction against the defendants from carrying these papers and these monies into court and from offering the same in evidence against the petitioners at the trial of said indictments. They also sought a permanent injunction against the defendants from further affirmatively sanctioning police incursion into the privacy of the plaintiffs and other citizens of the State of New Jersey (P29a, 30 to P31a, 6).

The defendants sought a summary judgment on the ground that the complaint failed to state claims upon which relief could be granted (P18a, 17). At the time of the argument of the motion what were believed to be formal deficiencies in the complaint were discovered and the court agreed to deal with the motion on its merits permitting a formal amendment later. The Chancery Division of the Superior Court in an opinion rendered by Judge Vincent S. Haneman held that the complaint with its proposed amendments did not state a claim upon which relief could be granted and determined that the defendants were entitled to summary judgment (P36a, 22), 43 N. J. Sup. 303, 128 A. 2d 743 (1956).

On February 4, 1957, an order was entered granting leave to amend the complaint (P19a) and an amended complaint

was filed (P20a). Also on February 4, 1958, an order for summary judgment in favor of the defendants was entered (P46a). Petitioners then appealed to the Appellate Division of the Superior Court of New Jersey (P1a).

The Appellate Division affirmed (P71a) on an opinion delivered by Judge Conford (P47a), 47 N. J. Sup. 1, 135 A. 2d 191 (1957). The petitioners then appealed to the Supreme Court of New Jersey, the highest court of that state (P72a, 1). The Supreme Court in an opinion written by Mr. Chief Justice Weintraub (page 1a of this petition and reported in 26 N. J. 506, 141 A. 2d 46, (1958)), affirmed. The mandate of the Supreme Court of New Jersey on affirmance was entered and filed on April 28, 1958. A copy of this mandate will be found at page 11a of this petition.

This petition seeks a writ of certiorari to review the judgment of the Supreme Court of New Jersey.

During the pendency of the appeal, Mr. Richman's term as Attorney General expired and David D. Furman was designated the Acting Attorney General of New Jersey. The Supreme Court of New Jersey entered an order substituting Mr. Furman as a party defendant in the place of Mr. Richman. That order is copied at page 12a of this petition. Mr. Furman has since been appointed and is now the Attorney General of New Jersey.

*F.*

This is a petition in which review of the judgment of a state court is sought. The federal questions sought to be reviewed were raised in the amended complaint filed by petitioners, (P21a, 11, Paragraph 4; P21a, 21, Paragraph 5; P21a, 27, Paragraph 6; P21a, 37, Paragraph 7; P22a, 12, Paragraph 8; P22a, 35, Paragraph 9; P23a, 24, part of Paragraph 10; P25a, 5, Paragraph 11; P26a, 32, part of Paragraph 14; P27a, 15, Paragraph 15; P28a, 16, part of Paragraph 16; P28a, 20, Paragraph 17; P29a, 30, Prayer A; P31a, 22-42, where Paragraphs 4 to 11 of the First Count of the amended complaint are incorporated by reference to the Second Count, P32a, 34, part of Paragraph 14; P33a, 17, Paragraph 15; P34a, 11, part of Paragraph 16; P34a, 19, Paragraph 17, which incorporated by reference Paragraph

17 of the First Count; P34a, 28, Prayer A).

The questions of law including the constitutional questions and the federal questions came before the court as questions of law on a motion for summary judgment (P18a, 17). Judge Haneman of the Chancery Division recognized the fact that the petitioners had raised federal questions in the following language:

> "Plaintiffs further allege that:
>
> "The above acts constituted a violation of the rights guaranteed to them under the Fourth Amendment to the Constitution of the United States, and through the Fourteenth Amendment of the Constitution of the United States the violation is a taking of their liberty and property without due process of law. The defendants were obligated to take an oath to support the constitution of the United States and the threatened conduct of the defendants is indicative of an official conscience departing from the obligation of the oath required by the Constitution of the United States, and actually taken by the defendants.
>
> "By way of relief they demand an injunction, the affect of which would be to direct the official conscience of the defendants in such fashion as to be consistent with and in harmony with the due process of law under the Fourteenth Amendment, including the obligations of the defendants to observe the rights the plaintiffs enjoy under the Fourth Amendment to the Constitution." (P37a, 39–P38a, 21.)

He determined that the remedy was discretionary and that the court should exercise its discretion even though the court found that the petitioners' constitutional guaranties had been violated and that the violation caused irreparable and imminent damage to the plaintiffs by saying:

> "Even though we should concede, for the sake of argument, that the violation of the constitutional guarantees causes irreparable and imminent damage to plaintiffs, this court should refuse to act.

"The remedy of specific performance is not a matter of strict right but rather one of sound judicial discretion." (P43a, 38–P44a,6).

Since the appeal to the Appellate Division of the Superior Court was from an order which determined that the complaint failed to state claims upon which relief can be granted, the sufficiency of the complaint was the issue to be determined by the appellate courts.

Judge Conford, in the Appellate Division, stated the issues raised by the appeal as follows:

"At the argument of the motion for summary judgment leave was granted to plaintiffs to file, for the record, an amended complaint to cover certain factual contentions inadvertently omitted from the complaint, but included within the scope of the argument on the motion. In essence, the amended complaint sets forth the following grievances. As to the plaintiff, Eleuteri, it is charged that one George Dann, a trooper in the State Police, subordinate to and under the control of the defendant, Attorney General Richman, on August 22, 1954 searched plaintiff's 'premises' at 134 Second Street in the City of Bordentown and took and carried away 'papers, money and property' belonging to him and that the search and seizure was illegal and unreasonable, in violation of specified provisions of the New Jersey and United States Constitutions in the respects: (a) that the only authorization for the search was a search warrant issued by the magistrate of the Municipal Court of the Township of Chesterfield, which was without jurisdiction in the City of Bordentown, and (b) that the warrant did not 'particularly' describe the papers and things to be seized; that as a result of the said search the predecessor of the defendant, Prosecutor Queenan of Burlington County, procured an indictment of plaintiff, charging him with what is commonly known as bookmaking and possession of lottery policy slips, both constituting statutory criminal offenses, and that the said defendant holds the papers and property so seized for use at

the trial of the plaintiff, being dependent thereon to establish a prima facie case against him; that both defendants are sworn to uphold the Constitutions both of New Jersey and of the United States; that the New Jersey courts of law as distinguished from the courts of equity, have so construed Article I, paragraph 7, of the New Jersey Constitution of 1947, securing the people from unreasonable search and seizure, and its predecessor provision under the Constitution of 1844, as to deny the people the right to be 'secure' in the sense intended by the Constitution of New Jersey and by the Fourth Amendment of the United States Constitution, the benefits of which extend to the citizen as against state action by virtue of the Fourteenth Amendment of the United States Constitution, particularly in that they have permitted papers and effects of citizens unauthorizedly searched and seized to be exposed to public view and used as evidence in the prosecution of such citizens for crime and have refused to suppress such papers and effects and return them to their owners notwithstanding that the search and seizure was illegal; that because of the 'uniform and well established construction' of the Constitutions in the manner stated, the State of New Jersey and its law enforcement officers, including the defendants, have 'affirmatively sanctioned, practiced and encouraged' unlawful police incursion into the privacy of citizens and that defendants have 'encouraged' their subordinates to take advantage of unconstitutional searches; that the search of plaintiff's home was 'part and parcel' of that illegal policy of the State of New Jersey; and that the remedy afforded by the New Jersey law courts for illegal or unconstitutional searches is an action for damages, which is inadequate and will not compensate plaintiff for being convicted of crime as a result of evidence obtained in violation of his constitutional rights. Wherefore the complaint of the plaintiff, Eleuteri, sought judgment declaring the search illegal and the retention by defendants of the papers and effects seized to constitute a continuing

unconstitutional seizure of his property, requiring defendants to return the property to the plaintiff or to deliver it to the court 'for destruction'; and enjoining defendants from offering any of the effects in evidence at the trial of the indictments and from any further unconstitutional searches of plaintiff's premises, and any further 'sanctioning in an affirmative way police incursion into the privacy of the plaintiff and the other citizens of the State of New Jersey.'

"As to the plaintiff, Danley, the complaint follows the same pattern except that the premises searched in this case were situated at 52 East Main Street in the Village of Columbus, Township of Mansfield, and the illegality charged, in addition to the jurisdictional and other defects in the warrant asserted on behalf of plaintiff, Eleuteri, includes the specification that the warrant authorized a search of Number 54, rather than 52, East Main Street." (P47a, 14–P49a, 22).

The Appellate Division of the Superior Court of New Jersey affirmed the Chancery Division (P71a). It suggested that the petitioners should have a remedy and that that remedy should be a motion for the suppression of the evidence but it left this question to be answered by the Supreme Court of New Jersey in the following language:

"It is the considered view of this bench that for the reasons set forth above both the vindication in a particular case of the constitutional rights of the subject of the illegal search and the prospective protection of the right of privacy of citizens, generally, require the sanction of suppression as evidence of property seized in violation of the constitutional guaranties. There should, moreover, be no differentiation based upon the degree of the violation, if violation there be. See Boyd v. United States, supra (116 U. S., at p. 635). But considerations of appropriateness compel us to defer to our highest court for a first instance judicial determination of the question left open in Application of Berlin, supra." (P67a, 5-17).

It further determined that the defendants were under a duty to present to the criminal court such evidence as they had since the State of New Jersey adhered to the non-exclusionary rule, and that a violation of their oaths should be punished by sanctions, saying:

> "If it is the law of this State that a defendant in a criminal prosecution has no right to an order from the court of criminal jurisdiction returning or suppressing as evidence property unconstitutionally taken from him—and we have decided not to hold otherwise in this case—it remains the duty of the defendant law enforcement officers to hold and present the evidence when the case comes to trial. True, as argued by plaintiffs, it is defendants' sworn duty to uphold both State and Federal Constitutions. Any participation, direct or indirect, on their part, in the constitutional transgression here involved would have been a violation of their respective oaths of office. (There is no charge here that there was such participation.) But the present status of the matter is that they are preparing to perform their duty to present evidence of crime in a pending prosecution. That, too, is their constitutional duty. If the case law of this State is to the effect that they cannot be diverted from that course by reason of the taint attending the procurement of the evidence, a contrary result cannot be accomplished in the name of enforcement of their oaths of office. There are appropriate sanctions for a violation of an oath of office. This action is not one of them." (P68a, 20–P69a, 5).

As to the charge that the State of New Jersey and its law enforcement officials were affirmatively sanctioning a policy of police incursion into the privacy of its citizens counter to the guarantee of the Fourteenth Amendment, it said:

> "The allegations in the amended complaint concerning affirmative sanction, practice and encouragement by the State of New Jersey and its officers, including defendants, of unconstitutional searches and seizures,

> are designed to bring the case within the statement in the opinion of the court in Wolf v. Colorado, supra, 'that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment' (338 U. S., at p. 28). Neither the complaint nor anything said on behalf of the plaintiffs in the argument supports the thought that their contention is anything more than that the case rule 'against suppression or exclusion of illegally secured evidence' tends to encourage violation of the constitutional guarantee. This is not an affirmative sanction by the State of illegal searches and seizures. There is no suggestion of any concerted, planned or general program by the state law enforcement authorities for disregard of the constitutional requirements for search and seizure. We do not find a grievance grounded in the Wolf exception properly invoked by the complaint in this case, because we perceive no genuine factual allegations in the complaint warranting its entertainment, nor do we apprehend that any would be forthcoming were the complaint again amended. Cf. Di Cristofaro v. Laurel Grove Memorial Park, 43 N. J. Super. 244 (App. Div. 1957). (P69a, 9-34).

In conclusion, Judge Conford said for the Appellate Division:

> "Since the approach taken by the court in this case has turned on the merits of the claim of constitutional infringement, there is no occasion to consider the authorities cited by plaintiffs supporting the concept of equitable jurisdiction to protect the right of privacy. (Citing cases) Our decision, technically, sustains the right of the defendants to pursue the course upon which they were embarked when the complaint was filed." (P70a, 5-16)

The Supreme Court of New Jersey also had before it the legal sufficiency of the petitioners' complaint including the determination of the federal questions therein set up and considered by the two lower courts. Chief Justice Weintraub recognized that the constitutional issues raised by the petitioners formed the right upon which the petitioners had access by appeal to that court, for he said:

> "Defendants obtained summary judgment on motion. 43 N. J. Super. 303 (Ch. Div., 1956). The Appellate Division affirmed, 47 N. J. Super. 1 (1957), and the plaintiffs are before us as of right because of the constitutional rights asserted." (Page 2a infra).

The Supreme Court of New Jersey conceded that the search warrants had been issued when the magistrate had no jurisdiction to issue them. (Page 2a infra). It found no substance in the contention that the search warrants were void for want of a statute expressly authorizing them. (Page 2a infra). It held that the papers and things to be seized were explicitly described and that the variance in the street number in the case of the Danley warrant was immaterial. (Page 2a infra). It held that the trooper acted in good faith. (Page 3a infra).

The Supreme Court of New Jersey appears to have thought that no federal right was involved and that the issue was as to whether or not it should depart from its long standing non-exclusionary rule for said the Chief Justice,

> "The quarrel centers about the need, appropriateness and efficacy of the exclusionary rule." (Page 5a infra).

Again the learned Chief Justice said,

> "At the oral argument we invited particularization, but nothing emerged to justify the probable purpose of the pleader to wedge into the area in which the Supreme Court indicated in Wolf that it would not intervene." (Page 10a infra).

As to the charge that the State of New Jersey and its law enforcement officials affirmatively sanctioned unconstitutional police incursion into the privacy of the citizens, the court said,

> "We agree with the Appellate Division that this charge is a mere assembly of generalities, devoid of specific content." (Page 10a infra).

The Supreme Court of New Jersey by affirming the judgment of the two lower courts held that the federal issues raised by the petitioners had no merit.

*G.*

Not applicable to this petition.

*H.*

1.

**The Searches and Seizures to Which The Petitioners Were Subjected Were Violative of The Fourth and Fourteenth Amendments to The Constitution of The United States.**

In *Wolf vs. the People of Colorado*, 338 U. S. 25, 27, 69 Supreme Court 1359, 1361. This Court made the guarantees of the Fourth Amendment enforceable against the States through the Due Process Clause of the Fourteenth Amendment. In this case, the homes of the petitioners were subjected to searches by officers of the New Jersey State Police which were proported made on the authority of search warrants, the granting of which concedingly was upon the jurisdiction of the magistrate who issued them. They were, therefore, void and afforded the officers no protection. *Wolf vs. People of Colorado*, 338 U. S. 25, 30; 69 Supreme Court 1359, 1362, Note 1.

By the terms of the Fourth Amendment, the people have a right to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. That right of security is one which is not to be violated. The Fourth Amendment also enjoins that no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized. Since the decision of this Court in the *Wolf* case, in 1949, all of these requirements of the Fourth Amendment are for the benefit of the people against State action whether a search and seizure is unreasonable, is now a federal question; whether or not a warrant has issued upon probable cause is a federal question; whether or not the oath which supports the search warrant particularly describes the place to be searched and the person or things to be seized are federal questions.

In the case at bar not only were the search warrants issued by a magistrate who had no jurisdiction over them but the Complaints or oaths upon which they were based set forth

no facts upon which a magistrate could determine whether or not probable cause for the issuance of a search warrant existed. P13a and P16a. Trooper George Dann, who made the Affidavits, in them said, "that he has just and reasonable cause to suspect and does suspect and believe that the premises with buildings thereon * * * is being knowingly used as a place, where gaming is taking place, in violation of N. J. S. 2A:112-3, and that his reasons for suspecting and believing that said violations are taking place are as follows:

"That he has been reliably informed that gaming is taking place in the premises known as the above described property."

He not only set forth no facts but he assertively shows that he had no knowledge of the situation, that a third-party-informant had the knowledge if anyone did, that the third-party-informant remains nameless, and that the magistrate to whom the applications were made had nothing on the basis of which he could determine whether a search warrant should or should not issue. In issuing the search warrants complained of, the magistrate apparently relied upon Trooper Dann's statement that "he has just and reasonable cause to suspect and does suspect and believe that the premises with buildings thereon is being knowingly used as a place where gaming is taking place." In other words, the magistrate allowed the Trooper to decide the question of probable cause and the Judicial intervention required by the Fourth Amendment to the Constitution of the United States consisted solely of finding and selling the land in a ministerial fashion.

In *Byars vs. United States*, 273 U. S. 28, 47 Supreme Court 248 (1927) and in *Grau vs. United States* 287 U. S. 124, 53 Supreme Court 38 (1932), this Court held that search warrants might not properly be issued on the strength of affidavits which merely asserted the belief of the affiant that certain facts were true and that searches conducted on warrants issued pursuant to such Complaints were in violation of the Fourth Amendment. In the latter case this Court in an opinion by Mr. Justice Roberts said, "a search warrant

may issue only upon evidence which would be competent at the trial of the offense before a jury and would lead a man of prudence and caution to believe that the offense has been committed." In this case, neither the Complaints nor the warrants attempted to describe any of the things to be seized. The Complaints prayed for a search warrant "to search for money, evidence, and all other paraphernalia used in connection with gaming in and upon the above described premises. P14a, 5 and P16a, 25. The warrants did not describe anything to be searched for or seized but authorized a search "for money and evidence used in connection with the said alleged crime, including any materials or things used in connection with the place of said alleged crime in and upon said described premises." P15a, 14 and P17a, 32. These, therefore, authorized general searches and were violation of the Fourth Amendment. *Marron vs. United States* 275 U. S. 192, 48 Supreme Court 74 (1927). The Supreme Court of New Jersey, in its opinion, held that the description of the property to be seized was quite sufficient.

Additionally, there was no Statute which authorized the issuance of a search warrant in gaming cases. The fourth Amendment to the Constitution of the United States was engrafted upon the Constitution because there had been wide spread abuses of search warrants in the Mother Country which the founders of our Government emphatically desired to prevent in this Country. At common law, the use of search warrants was confined to proceedings for the discovery and seizure of stolen goods. The efficacy of the warrant was turned to political seizures and the Constitutional Amendment was adopted for the purpose of preventing these abuses. The use of these writs is, therefore, limited to cases in which it is authorized by Statute or for the discovery and seizure of stolen goods as at common law, 47 Am. Jur. page 503, paragraph 2 and page 511, paragraph 14. See also *State vs. certain contraceptive materials* 126 Conn. 428, 11 At. 2nd 863 (1940); *State ex rel. Streit vs. Justice Court* 45 Mont. 375, 123 Pacific 405 48 LRA (NS) 156; *People ex rel. Robert Simpson Company vs. Kempner*, 208 N. Y. 16,

101 N. E. 794, 46 LRA (NS) 970 Ann. Cas. 1914D 169; *Smith vs. McDuffee*, 72 Ore. 276, 142 Pacific 558, 143 Pacific 929 Ann. Cas. 1916D 947.

The instances in which the issuance of search warrants is authorized by Statute in New Jersey are few. The opinion of Chief Justice Weintraub contains a virtual catalog of such. His references do not include any authorization for the issuance of search warrants in gambling cases or in cases generally involving a breach of the criminal laws.

The Supreme Court of New Jersey found it unobjectionable from a point of view of the law of that State that the issuance of a search warrant is not authorized by Statute. The Statute Law of New Jersey expressly authorizes the searches and seizures in liquor cases, Revised Statutes of New Jersey 1937 33:1-56 - 66; In aid of the enforcement of duties of the Department of Agriculture, New Jersey Statutes Annotated 4:1-24 in cases where bottles, containers or receptacles are being used in violation of the State Trade Laws New Jersey Statutes Annotated 56:3-25; in cases for the protection of owners of milk or cream cans, New Jersey Statutes Annotated 56:3-47; in cases involving cruelty to animals, Revised Statutes of New Jersey 1937 4:22-46; in cases involving the fish and game laws, Revised Statutes of New Jersey 1937 23:4-35; in cases involving health laws, Revised Statutes of New Jersey 1937 26:13-59 - 63 and, recently to certain narcotic and limited types of cases. The Court Below recognized this in the following language:

> "We find no substance in the second point, that the search warrants were void for want of a Statute expressly authorizing them with respect to violations of the gaming Statute, the authority is implicit in the judicial power and is acknowledged in the very provision of the Statutes upon which Plaintiffs rely. A different view cannot be found in the circumstance that the Legislature has expressly authorized searches in some situations, largely in aid of regulatory measures not involving criminal liability, such as, R. S. 4:1-23; R. S. 23:4-35; R. S. 23:10-20; R. S. 26:3-59; R. S. 55:11-16; R. S. 56:3-25 and 47, New Jersey SA; or that the Legislature saw

fit to regulate searches and seizures in the field of alcoholic beverages R. S. 33:1-56 et seq. N. J. S. A., wherein we note, that a provision appears for the return of lawful property illegally seized under colors of a warrant, R. S. 33:1-62, N. J. S. A. and certain abuses connected with searches are denounced as misdemeanors R. S. 33:1-64 and 65; N. J. S. A.

In application of Berlin, 19 N. J. 522, 117 At. 2nd 610 1955 in which a search warrant in connection with a gaming offense was sustained, no one suggested the issue here tendered and doubtless cause of the common acceptance of the proposition that the power is inherent."

If it be the law of New Jersey that the power to issue a search warrant is inherent in the judicial department, we do not believe that such is or ought to be the law of the United States. If this is the law, there is no limit to which the uses of a search warrant may be put. This is the very reason that the Fourth Amendment was adopted. We, therefore, conceive the law of the United States applicable to the Fourth Amendment to be that except in cases of stolen property, search warrants may be issued only in that type of case specifically authorized by Statute.

The Supreme Court of New Jersey also considered that the papers and things to be seized were sufficiently and explicitly described. It that be the law of the State of New Jersey, it is not consonant with the pronouncements of this Court which construe the Fourth Amendment. *Marron vs. United States*, 275 U. S. 192, 48 Supreme Court, 75 (1927).

Under New Jersey law, the issuance of a search warrant is not judicially reviewable. *State vs. Springer*, 57 N. J. Law 353, 31 At. 215 (1894). Neither will a motion to suppress evidence unlawfully searched for and seized be entertained. *State vs. Black*, 5 New Jersey Misc. 48, 135 At. 685 (1926); *State vs. First Criminal Judicial Court of Bergen County*, 10 New Jersey Misc. 715; 160 At. 672 (1932); *In re 301 – 317 Clinton Avenue*, 35 New Jersey Superior 136 (1955).

We believe that the searches and seizures in the cases at bar were unreasonable searches and seizures judged by federal standards and that the seizure taking and retention of the petitioner's property was in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States.

2.

**The Complaint Stated Claims Federally Protected Upon Which Relief Could and Should Have Been Granted.**

In the case at bar, the petitioners were victimized by an illegal search. The Supreme Court of New Jersey concedes that the search warrants relied upon for the searches were void for want of jurisdiction in the magistrate to issue them. We have endeavored to point out a number of other reasons why the search and seizure was illegal and unreasonable. Whatever be the reason, a start can be made on the premise that the state police conducted raids upon the petitioners' homes without the benefit of any valid search warrant. In the course of their search they discovered certain property and money which they seized and took away. They have retained these papers and money until the present time. The complaint charges that these officers are members of a department under the direct supervision of the defendant, Mr. Furman, who is the Attorney General of New Jersey (P20a, 24, P31a, 14). Since the search was clearly illegal and unreasonable, the seizure was also illegal and unreasonable. The officers who seized and took the petitioners' property were trespassers on the property rights of the petitioners. The retention by Mr. Furman's agents of the petitioners' property is a continuing wrong. It is as wrong today as it was on the day of the seizure. If the retention of this property is continued it will be as wrong tomorrow as it is today.

This court in an opinion by Mr. Justice Day, in *Weeks v. United States*, 232 U. S. 383, 393 (1913), phrased our contention in the following language:

> "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense the protection of the Fourth Amendment declaring his right to be secure against searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."

This court has therefore held that, 1. the seizure, 2. the holding, and 3. the using in evidence against a citizen accused of an offense of his property seized in violation of the Fourth Amendment are themselves violations of the Fourth Amendment.

In *Wolf v. People of Colorado*, 338 U.S. 25, 69 S. Ct. 1359, this court held that the provisions of the Fourth Amendment are now applicable through the due process of law clause of the Fourteenth Amendment to the actions of states and state officers. In that case this court did however hold that the state courts had the right to prescribe their own rules of evidence and if they prescribed and followed the non-exclusionary rule of evidence that a conviction based upon such evidence would not be violative of the Fourth and Fourteenth Amendments. Our contention in this case assumes that that holding of the *Wolf* case would be adhered to by this court today.

We contend that the Fourth Amendment as interpreted by this court in the *Weeks* case and the Fourteenth Amendment as applied by this court in the *Wolf* case, demonstrate that it is wrong for an attorney general through his subordinates to hold and use in evidence against citizens charged with crime the property of those citizens taken in an unlawful search and seizure and that this contention does not interfere with the right of the state courts to prescribe whatever rules of evidence it will. If it is wrong for the agents of the attorney general to hold petitioners' property today, it is wrong for the attorney general to hold it tomorrow. It is wrong for the attorney general to show it to other people including judges and jurors and it is wrong for him to use it in a state court even though the rules of evidence established and followed by that court permit it.

The reason that it is wrong is, first, that the *Weeks* case which interprets the Fourth Amendment declares that it is wrong to do so. Secondly, the Attorney General of New Jersey and the Courty Prosecutor of Burlington County, who are the defendants in this suit, are required by Article VI, Clause 3, of the Constitution of the United States, to be bound by oath or affirmation to support the Constitution of the United States. Petitioners' complaint alleges that they have taken this oath. (P22a, 35, P31a, 34). Their oath is, therefore, the measure of their duty. This court so held in an opinion by Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch 137 (1803), in the following language:

> "From these, and many other selections which might be made, it is apparent, that the framers of the Constitution contemplated that instrument as a rule for the government of the courts, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!
>
> "The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on the subject. It is in these words: 'I do solemnly swear, that I will administer justice, without respect to persons, and do equal rights to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as * * *, according to the best of my abilities and understanding, agreeable to the Constitution and laws of the United States.' Why does a judge swear to discharge his duties agreeable to the Constitution of the United States, if that Constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime." *Marbury v. Madison*, 1 Cranch 137, 180 (1803).

Chief Justice Taney held likewise when he wrote in *Abelman v. Booth*, 21 How. 506, 525 (1858):

> "Now is there anything in this supremacy of the general government, or the jurisdiction of its judicial tribunals, to awaken the jealousy or offend the natural and and just pride of a state sovereignty. Neither this Government, nor the powers of which we are speaking, were forced upon the States. The Constitution of the United States, with all the powers conferred by it on the General Government, and surrendered by the States, was the voluntary act of the people of the several States, deliberately done, for their own protection and safety against injustice from one another. And their anxiety to preserve it in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State, is proved by the clause which requires that the Members of the State Legislatures, and all executive and judicial officers of the several States, (as well as those of the General Government), shall be bound by oath or affirmation, to support this Constitution. This is the last and closing clause of the Constitution, and inserted when the whole frame of the Government, with the powers hereinbefore specified, had been adopted by the Convention; and it was in that form, and with these powers, that the Constitution was submitted to the people of the several States, for their consideration and decision.
>
> "Now it certainly can be no humiliation to the citizen of a republic to yield a ready obedience to the laws as administered by the constituted authorities. On the contrary, it is among his first and highest duties as a citizen, because free government cannot exist without it. Nor can it be inconsistent with the dignity of a sovereign State to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a State of this Union. On the contrary, the highest honor of sovereignty is untarnished faith. And certainly, no faith could be more

> deliberately and solemnly pledged than that which every State has plighted to the other States to support the Constitution as it is, in all its provisions, until they shall be altered in the manner which the Constitution itself prescribes. In the emphatic language of the pledge required, it is to support this Constitution. And no power is more clearly conferred by the Constitution and laws of the United States, than that the power of this court to decide, ultimately and finally, all cases arising under such Constitution and laws; and for that purpose to bring here to revision, by writ of error, the judgment of a state court, where such questions have arisen, and the right claimed under them denied by the highest judicial tribunal in the state."

The Appellate Division of the Superior Court of New Jersey in dealing with this subject held that since it was the duty of the Attorney General and Prosecutor to prosecute, their duty lay in producing to the court that evidence which the court had by a long line of decisions declared to be admissable evidence and that any digression from their oath to support the Constitution of the United States should be dealt with by other sanctions. (P68a, 20 – P69a, 5).

The view of the Appellate Division, it seems to us, overlooks the "supremacy clause" in Clause 2 of Article VI of the Constitution of the United States and the case of *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 40 S. Ct. 182, 64 L. Ed. 319. As a matter of fact in *Abelman v. Booth*, *supra*, the holding of this court was that when a state attorney general finds that his duties imposed by state law direct him in one direction and his oath to support the Constitution of the United States points to another direction, it is his duty to obey the Constitution of the United States.

Very recently this court has dealt with this same issue in another form. In *In re Estate of Stephen Girard, deceased*, 386 Pa. 548, 127 A. 2d 287 (1956), the Supreme Court of Pennsylvania, held that under the law of that state a will which established a trust for "poor male white orphan children" was one which was not subject to or controlled by

state action, was valid, and was beyond the orbit of the Fourteenth Amendment. This court, however, held that since an agency of the State of Pennsylvania was operating the trust as a trustee, its discrimination against the admission of negroes to the benefits of the trust was forbidden by the Fourteenth Amendment. In that case although the Supreme Court of Pennsylvania held that under state law it was perfectly legal for a trust to discriminate against members of the colored race in favor of members of the white race, this court held that state officers could not participate in the discrimination because the Fourteenth Amendment to the Constitution forbade them to do so. We think that case is parallel with the ones at bar. This court has held in the *Wolf* case that a state may prescribe its own rule of evidence and that if it prescribes a different rule of evidence than this court pronounced in the *Weeks* case, a person subjected to the application of that rule of evidence could not complain that he had been denied due process of law. Granted therefore, that the state courts have this prerogative. The Attorney General and the County Prosecutor having taken an oath to support the Constitution of the United States and being required by the Constitution itself to take an oath to support the Constitution of the United States, including the Fourth and Fourteenth Amendments and the pronouncements of this court in *Weeks v. United States* and *Silverthorne Lumber Co. v. United States*, are in the same position as the Board of Directors of City Trusts was in the Girard will case. They were enjoined by the Fourth and Fourteenth Amendments not to violate the right of the petitioners to be secure in their property. They were forbidden by the Fourth Amendment as interpreted by the *Weeks* case to seize, to hold and to use in evidence against the petitioners that property of the petitioners seized in an unlawful search and seizure.

That New Jersey subscribes to the non-exclusionary rule cannot be doubted. See Table E of the Appendix to the opinion of Mr. Justice Frankfurter in *Wolf v. People of Colorado*, 338 U. S. 25, 35, 69 S. Ct. 1359, 1365, and the cases cited in the opinion of the Supreme Court of New Jersey below. *Eleuteri v. Richman*, 26 N. J. 506, 141 A. 2d 46, 48.

In addition a statute exists which makes money seized in a gambling raid prima facie contraband, which requires the money to be deposited with the county treasurer pending disposition of the charge, which provides for a forfeiture of the money in the event of a conviction and which places the burden of recovering the money in the event of an acquittal upon the claimant. Revised Statutes of New Jersey, 2A:152-7 to 10.

It is intimated by some authorities including the learned judges who heard this matter in both the Chancery and Appellate Divisions of the Superior Court of New Jersey, that a citizen victimized by an unlawful search and seizure has some remedy against the wrongdoer. Judge Haneman in the Chancery Division attempted to spell out the remedies. (P40a, 35 – P41a, 16, P50a, 19 – P51a, 39). And it comments that,

> "A fruitless violation leaves the innocent victim to the sorry remedy of an action for damages."

The Superior Court in the above cited portions of its opinion does not seem to share with firmness the opinion of the Chancery Judge as to what remedies were open to your petitioners. It suggested that there should be the remedy of suppression of the evidence but deferred to the Supreme Court of New Jersey for a determination of that question. (P67a, 5-17). One fact remains crystal clear that the petitioners as a part of the relief demanded by them in their complaint in this suit was for the return of their money and property from a defendant under whose command were the officers who had the physical possession of it. Even that relief the trial court denied. It would, therefore, seem that under the laws of New Jersey property seized in an unlawful search may be retained by the prosecuting officers at least until after acquittal of the owners and that meanwhile the owners are deprived of their property. This strongly suggests the taking of private property for public use without just compensation. In any event, it literally amounts to a taking and retention of the petitioners' property not only without due process of law but without any process of law. Such a situation points up the fact that the only remedy which the petitioners have is their

remedy under the Constitution of the United States.

The defendants have relied upon *Stefanelli v. Minard*, 342 U. S. 117, 72 S. Ct. 118, 96 L. Ed. 138 (1951), and so has the Supreme Court of New Jersey. 26 N. J. 506, 141 A. 2d 46, 49. That case is no authority here. Its holding did not reach the merits of this case. It was a case instituted in the United States District Court for the District of New Jersey to enjoin a county prosecutor from using in a state court evidence obtained as a result of an unlawful search and seizure. What this court did hold was that although the District Court may have had jurisdiction to entertain the action and grant the relief sought, that a sound legal discretion directed that the jurisdiction should not be exercised. Such was also the holding of the United States District Court and the United States Court of Appeals. In the latter court, it stated in its per curiam opinion that every question there raised could have been asserted by the plaintiffs in the state courts of New Jersey and that the way to the Supreme Court of the United States lies open. The very procedure suggested by that court is the procedure we have adopted and we now seek the remedy in this court which the United States Court of Appeals for the Third Circuit thought was available.

We seek injunctive relief and that type of relief seems to be appropriate and to have received the approval of this court. In *Rea v. United States*, 350 U. S. 214, 76 S. Ct. 292 (1956), this court reversed the judgments of the United States District Court for the District of New Mexico and the United States Court of Appeals for the Tenth Circuit which denied an injunction to a citizen who had been subjected to an unlawful search and seizure by a federal officer, who, after the evidence had been suppressed in the United States District Court threatened to take the same evidence to a state Court following the non-exclusionary rule. The holding of this court was that an injunction should lie against the federal agent.

The remedy of injunction is not inappropriate in the courts of New Jersey. In *Vanderbilt v. Mitchell*, 72 N. J. Eq. 910 (1907), the Court of Errors and Appeals held that a right of privacy exists in New Jersey which equity will protect even

in the absence of a property right.

In *Brex v. Smith*, 104 N. J. Eq. 386, 146 A. 34 (1929), the Court of Chancery restrained a county prosecutor from examining the bank records of certain policemen and their wives in violation of their right of privacy.

The attorney general was enjoined in *McGovern v. Van Riper*, 137 N. J. Eq. 24 (1945), affirmed in 137 N. J. Eq. 548 (1945), and his assistant, *Frey v. Dixon*, 141 N. J. Eq. 481, from violating a citizen's right of privacy. So also were county prosecutors. *O'Brien v. Scott*, 20 N. J. Super. 132 (1952), *S. & R. Amusement Corp. v. Quinn*, 136 N. J. Eq. 420 (1944).

Since the right exists and the remedy seems to be appropriate, we do ask for a writ of certiorari from this court to the end that the federal rights of the petitioners here may be fully vindicated.

3.

**The Charge in the Plaintiffs' Complaint That the State and Its Law Enforcement Officers, Including the Defendants, Had and Were Affirmatively Sanctioning, Practicing and Encouraging Unlawful, Unwarranted, Unjustifiable and Unconstitutional Police Incursion Into the Privacy of Its Citizens and That the Searches and Seizures Complained of Were Part and Parcel of This Policy, States a Federally Protected Cause of Action for Which Relief Could and Should Have Been Granted.**

In *Wolf v. People of Colorado*, 338 U. S. 25, 28, 69 S. Ct. 1359, 1361 (1949), this court in an opinion by Mr. Justice Frankfurter, said:

> "Accordingly, we have no hesitation in saying that were a State to affirmatively sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment. But the ways of enforcing such a basic right raise questions of a different order. How such an arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution."

In their complaint, the petitioners charged almost exactly in the language of Mr. Justice Frankfurter that because New Jersey has long adhered to the non-exclusionary rule "the State of New Jersey and its law enforcement officers, including attorneys general and county prosecutors and specifically including the defendants herein, has affirmatively sanctioned, practiced and encouraged unlawful, unwarranted, unjustifiable and unconstitutional police incursion into the privacy of the citizens of said state and law enforcement officers including the defendants have been encouraged to and have themselves encouraged others

subordinate to them and under their jurisdiction and control to take advantage of unconstitutional and unlawful searches of the persons and property of the citizens of New Jersey and of the unlawful and unconstitutional seizure of their property, well knowing that under the construction of the searches and seizures placed thereupon by the courts of this state, the people in effect have no guarantee of security against unreasonable searches and seizures by their constitution, but merely a court given right of action for damages." etc. (P25a, 5-26, P31a, 40). They also charged in their complaint that the illegal searches and seizures specifically complained of by them was part and parcel of this policy. (P28a, 20; P34a, 19).

Conceiving that they had pleaded a cause of action on the authority of *Wolf v. People of Colorado, supra,* the petitioners sought the return of their property or its destruction by the court or an injunction against its use by the defendants.

Since the sufficiency of this allegation arose on a motion for summary judgment on the ground that a case was not stated for which relief could be granted, the issue arose on what was equivalent to a common law demurrer and in such a situation allegations of fact well pleaded must be taken as true for the purpose of the motion.

The Appellate Division of the Superior Court dealt with this issue in the following language:

> "Neither the complaint nor anything said on behalf of the plaintiffs in the argument supports the thought that their contention is anything more than that the case rule against suppression or exclusion of illegally secured evidence tends to encourage violation of the constitutional guarantee. This is not an affirmative sanction by the State of illegal searches and seizures. There is no suggestion of any concerted, planned or general program by the state law enforcement authorities for disregard of the constitutional requirements for search and seizure." (P69a, 17-27).

The comment of the Supreme Court of New Jersey on this same issue was:

> "We agree with the Appellate Division that this charge is a mere assembly of generalities, devoid of specific content. At the oral argument we invited particularization, but nothing emerged to justify the probable purpose of the pleader to wedge into the area in which the Supreme Court indicated in Wolf that it would intervene. At any rate, plaintiffs are not victims of the program they vaguely allege. It is not asserted that the trooper selected the wrong magistrate to obtain warrants he knew proper magistrates would have refused." 26 N. J. 506, 141 A. 2d 46, 52.

We think when we say that such a policy exists and has many years existed and that the defendants are participating in it and that they have practiced, sanctioned and encouraged unlawful, unwarranted, unjustifiable and unconstitutional police incursion into the privacy of citizens and that the searches and seizures in this case were a part of that activity, that we have made a charge which we are entitled to an opportunity to prove.

Rule 4:8-5 promulgated by the Supreme Court of New Jersey is identical with Rule 8 (e) (1) of the Federal Rules of Civil Procedure:

> "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required."

The Supreme Court of New Jersey has also promulgated as one of the rules of practice its Rule 4:9-3, as follows:

> "Acts and contracts may be stated according to their legal effect, but in so doing the pleading should be such as fairly to apprise the adverse party of the states of facts which it is intended to prove; thus, an act or promise of a principal other than a corporation, if in fact proceeding from an agent known to the pleader, should be so stated. In pleading an official document or official act it is sufficient to aver that the document was executed or the act done in compliance with law."

The State of New Jersey has attempted to abolish many of the technical aspects of pleading and to adopt rules of pleading and practice largely following the Federal Rules of Civil Procedure. Niceties in pleading are no longer required. We think petitioners simply, concisely and directly pleaded according to legal effect and did so in a manner such as fairly to apprise the defendants of the state of facts which it was intended to prove. By affirming the grant of a summary judgment, the Supreme Court of New Jersey did not give the plaintiffs' pleading fully credit but in effect took issue with the factual statements contained therein. The petitioners did state a cause of action based upon a federal right which they should have had an opportunity to sustain by evidence. The action of each of the courts of the State of New Jersey in which the matter has been has had the effect of denying this right to the petitioners and therefore of denying them the enforcement of their federal right.

*I.*

Appended hereto are copies of the opinion of Chief Justice Weintraub in the Supreme Court of New Jersey, of the mandate of the Supreme Court of New Jersey on affirmance, and of the motion for and an order granting substitution of a party defendant.

Respectfully submitted,

JAMES M. DAVIS, JR.
*Attorney of Petitioners*
110 High Street
Mount Holly, N. J.

# APPENDIX

## OPINION

Argued March 4, 1958. Decided

On appeal from the Superior Court, Appellate Division.

Mr. James M. Davis, Jr. argued the cause for Plaintiffs-Appellants. Messrs. Powell and Davis, Attorneys.

Mr. David D. Furman, Deputy Attorney General of New Jersey argued the cause for Defendants-Respondents. Mr. Grover C. Richman, Jr., Attorney General of New Jersey, Attorney. Mr. David D. Furman, Of Counsel. Mr. Harold J. Ashby, Deputy Attorney General, On the Brief.

The opinion of the Court was delivered by
WEINTRAUB, C. J.

On August 22, 1954, a member of the New Jersey State Police applied to the magistrate of the Municipal Court of Chesterfield Township for search warrants. His affidavits alleged just and reasonable cause to believe that gaming was taking place in violation of *N. J. S.* 24:112-3. The premises were described respectively as 134 Second Street in the City of Bordentown and 54 East Main Street in the Township of Mansfield. The search warrants issued and were executed.

Plaintiffs filed a complaint in the Chancery Division of the Superior Court seeking among other things to suppress the product of the raids. Both plaintiffs alleged illegality in that (1) the magistrate was without authority to issue a warrant for a search beyond the territorial limits of his court, (2) no authority exists for a warrant in connection with gambling, and (3) the warrants do not "particularly" describe the papers and things to be seized as required by Article I, paragraph 7 of the Constitution of New Jersey. In the course of his complaint, plaintiff Damey described the premises searched as 52 East Main Street (the warrant read "54") but no charge of illegality by reason of that variance is specifically pleaded. Both plaintiffs allege indictments

were procured on the basis of the papers and property seized and add that the State "will rely upon the same at the trial of said indictment and in the absence of the same cannot prove a prima facie case under said indictment."

Defendants obtained summary judgment on motion. 43 N. J. Super. 303 (Ch. Div. 1956). The Appellate Division affirmed, 47 N. J. Super. 1 (1957), and plaintiffs are before us as of right because of the constitutional questions asserted.

The State concedes the magistrate was without authority to issue a warrant for a search beyond the territorial jurisdiction of his court, *N. J. S.* 2A:8-20, and we think the concession is correct.

We find no substance in the second point, that the search warrants were void for want of a statute expressly authorizing them with respect to violations of the gaming statutes. The authority is implicit in the judicial power and is acknowledged in the very provision of the Constitution upon which plaintiffs rely. A different view cannot be found in the circumstance that the Legislature has expressly authorized searches in some situations, largely in aid of regulatory measures not involving criminal liability, such as *R. S.* 4:1-23; *R. S.* 23:4-35; *R. S.* 23:10-20; *R. S.* 26:3-59; *R. S.* 55:11-16; *R. S.* 56:3-25 and 47; or that the Legislature saw fit to regulate searches and seizures in the field of alcoholic beverages, *R. S.* 33:1-56, *et seq.*, wherein we note, parenthetically, that a provision appears for the return of lawful property illegally seized under color of a warrant, *R. S.* 33:1-52, and certain abuses connected with searches are denounced as misdemeanors, *R. S.* 33:1-64 and 65. In *Application of Berlin*, 19 N. J. 522 (1955), in which a search warrant in connection with a gaming offense was sustained, no one suggested the issue here tendered, and doubtless because of the common acceptance of the proposition that the power is inherent.

As to the third objection, we fail to understand how the papers and things to be seized could be more explicitly des-

cribed. And with respect to plaintiff Danley, if we assume he pleads illegality because of the variance in the street number, it is enough to say that if that claim be correct, it would add nothing decisive to the conceded illegality arising out of the magistrate's lack of authority.

In sum total, for the purpose of this appeal, illegality is clear, but equally clear is the fact that the trooper in good faith attempted to comply with the applicable mandate of the Constitutions, Federal and State, that a magistrate's decision intervene between the police and the search.

Plaintiffs recognize that this State has adhered to the rule that proof otherwise admissible will be received notwithstanding illegality of search and seizure. *State v. Alexander*, 7 N. J. 585, 594 (1951), *certiorari denied*, 343 U. S. 908 (1952); *State v. Lyons*, 99 N. J. L. 301 (E. & A. 1923); *State v. Merra*, 103 N. J. L. 361 (E. & A. 1927); *State v. Cortese*, 104 N. J. L. 447 (E. & A. 1927) *affirming* 4 N. J. Misc. 683 (Sup. Ct. 1926); *State v. Guida*, 119 N. J. L. 464 (E. & A. 1938), *affirming* 118 N. J. L. 289 (Sup. Ct. 1937). They contend, however, that the rule is designed to avoid interruption of a criminal trial by collateral inquiries, and hence that a proceeding may be maintained in advance of the trial for the return or suppression of the matters seized. In jurisdictions which exclude evidence obtained by unreasonable search and seizure, an objection at trial may come too late. 2 *Wharton, Criminal Evidence* (12th ed. 1955), § 699, p. 705. See, for example, Rule 41(e) of the Federal Rules of Criminal Procedure. Reliance is also placed upon the fact that in several of our cases the denial of an application for the return of the seized property was upheld upon a finding that the search or warrant was lawful, without ruling upon the right to relief if illegality had appeared. *Application of Berlin, supra* (19 N. J. at 531); *State v. Giberson*, 99 N. J. L. 85 (E. & A. 1923); *State v. Mausert*, 88 N. J. L. 286 (E. & A. 1915). But our rule of admissibility does not hinge upon the mode or time of an application to suppress but rather rests upon a policy decision that competent proof shall be available for the prosecu-

tion of the offense notwithstanding illegality in the seizure. *State v. First Criminal Judicial District Court*, 10 N. J. Misc. 715 (Sup. Ct. 1932); *State v. Black*, 5 N. J. Misc. 48 (Ct. Quart. Sess. 1926). It was undoubtedly because of this understanding of our cases that this court omitted to adopt Federal Rule 41(e), cited above, when our rules of court were promulgated.

Our rules being silent as to procedure, we pass the adjective aspect with, however, the observation that it is contrary to our basic thesis to parcel a controversey among several trial courts. An application to the court in which the indictments are pending is the course which here would have been consonant with our approach. We nonetheless accept the meritorious issue, as did the Appellate Division. That court reviewed the subject exhaustively and concluded that, although it believed illegally seized proof should be suppressed, the issue should be settled by us.

The leading advocate of the exclusionary doctrine is the United States Supreme Court which ruled for federal purposes that evidence seized in violation of the Fourth Amendment must be returned or suppressed upon suitable application. *Weeks v. United States*, 232 U. S. 383 (1914). In *Wolf v. Colorado*, 338 U. S. 25 (1949), the court held the Fourth Amendment applicable to the States by way of the due process clause of the Fourteenth, but that the rule of exclusion "was not derived from the explicit requirements of the Fourth Amendment" but rather "was a matter of judicial implication" and as such is not binding upon the States. The court added, however, that it had "no hesitation in saying that were State affirmatively to sanction such police incursions into privacy it would run counter to the guaranty of the Fourteenth Amendment." (338 U. S. at 28). The court has declined to interfere with a state prosecution notwithstanding a claimed violation of the Federal Civil Rights Act. *Stefanelli v. Minard*, 342 U. S. 117 (1951); *cf Irvine v. California*, 347 U. S. 128 (1954).

The *Weeks* case unsettled confidence in the rule of admissibility, but a majority of the states, many after searching reconsideration, has retained it. *Wolf v. Colorado, supra* (338 U. S. at 29); *annotation* 50 *A. L. R.* 2d 531, 535 (1956).

Article I, paragraph 7 of our State Constitution of 1947 repeats the earlier guaranty of the Constitution of 1844, in turn borrowed from the Fourth Amendment. At the Constitutional Convention of 1947, an amendment was proposed:

> "Nothing obtained in violation hereof shall be received into evidence."

The issue was debated, with specific reference to the merits of the federal rule. One delegate added that in any event he questioned the advisability of incorporating an answer either way in organic law. The amendment was defeated by a vote of 46 to 25. 1 *Convention Proceedings Record*, 598, 608. We do not infer that the delegates intended thereby to embed our case law, but it is equally clear that the rule of exclusion is not the unmistakable wake of the constitutional provision. Had the Constitution decided the issue, we would not concern ourselves with the utility or consequences of the decision. The question however being unresolved by either the Federal or State Constitutions, we must strike a balance between the contending interests.

The guaranty is agreed to be one of the great imperatives of a decent society. It stands between the citizen and a police state. The quarrel centers about the need, appropriateness, and efficacy of the exclusionary rule. The force of the pros and cons is reflected by the sharply divided and spirited views among the courts and academic writers. 8 *Wigmore, Evidence* (3d ed. 1940), § 2183, *et seq.*; *McCormick, Evidence* (1954), § 137, *et. seq.*

The exclusionary rule rests upon two propositions. The first is that government should not stoop to the "dirty business" of a criminal in order to catch him. The second is that civil and criminal remedies against the offending officer are as a practical matter ineffective, and hence the rule of ex-

clusion is the only available remedy to protect society from the excesses which led to the constitutional right.

On the other side, many considerations are aggregated. The issue arises only when the evidence is incriminating and thus, in its immediate impact, the rule of exclusion benefits only the guilty. Unlike the extorted confession, to which an analogy is frequently drawn, the evidence illegally seized is not the fruit of official wrong; it is the criminal's own work product which could have been seized lawfully and used against him. If such evidence and "the fruit of the poisonous tree" are suppressed, "The criminal is to go free because the constable has blundered." *People v. Defore*, 242 N. Y. 13, 150 N. E. 585, 587 (Ct. App. 1926), *certiorari denied*, 270 U. S. 657 (1926). Two wrongs go unpunished, at the expense of society. 8 *Wigmore, supra*, § 2184, p. 40. Unlike the federal government for which the exclusionary rule was conceived, the States must contend with many more crimes of violence. The stakes are different.

It is further argued that the federal rule has been denied its logical sweep, *People v. Defore, supra; comment*, 58 Yale L. J. 144 (1948), thus evidencing its unwisdom, 8 *Wigmore, supra*, § 2184a, p. 41. For example, the federal courts will not apply their rule if the constitutional right invaded was not that of the defendant (but see *United States v. Jeffers*, 342 U. S. 48 (1951)), or if the infraction of the Fourth is by a state officer acting independently of a federal representative (this latter proposition at the moment is an open question, *Benanti v. United States*, 355 U. S. ——, n. 10 (1957)). The evidence may be used on cross-examination if the defendant's direct testimony invites contradiction. *Walder v. United States*, 347 U. S. 62 (1954).

The most serious criticism is that the exclusionary rule has led to a myriad of minute and vague distinctions, enveloping with uncertainty an area in which enforcement officials must know what they may and may not do. *State v. Mara*, 26 N. H. 463, 78 A. 2d 922 (Sup. Ct. 1951). "Even as to the substantive rule governing federal searches in violation of

the Fourth Amendment, both the Court and individual Justices have wavered considerably." *Irvine v. California, supra* (347 U. S. at 134).

And lastly it is urged there is no persuasive evidence that the constitutional guaranty fares better in jurisdictions which embrace the federal rule. *Irvine v. California, supra* (347 U. S. at 135-37); Grant, *Circumventing the Fourth Amendment*, 14 So. Calif. L. Rev. 359 (1941). The refusal of a majority of the United States Supreme Court to apply the exclusionary rule to the States is itself suggestive of doubt as to the soundness of the rule in the area of state responsibility.

The return or suppression of evidence of crime is not a remedy, in a strict sense, of the constitutional wrong. It would protect the victim against the aftermath, but would not compensate him for the invasion of his privacy. Nor are property rights as such in issue on the application; defendant does not seek to recover property for its intrinsic value, but rather seeks to bar the use of it or secondary testimony with respect to it as evidence against him. Hence the exclusionary rule has the role of a deterrent—a device to compel respect for the guaranty by removing an incentive to disregard it. It is calculated to prevent; not to repair. The postulate is an enforcement official indifferent to basic rights. Thus in *Wolf*, Mr. Justice Frankfurter stated the question to be "(h)ow such arbitrary conduct should be checked" (338 U. S. at 28) and referred to the exclusion of evidence as a "way of deterring unreasonable searches" (p. 31). Mr. Justice Douglas, dissenting, described the exclusionary rule as the only "effective sanction" (p. 40). Mr. Justice Murphy, dissenting, spoke of "a positive deterrent to police and prosecutors tempted to violate the Fourth Amendment" (p. 42). Mr. Justice Rutledge, also dissenting, agreed "the Amendment without the sanction is a dead letter" (p. 47).

In the debate of the issue the guaranty is pitted against "dirty business". The issue was stated in *People v. Defore, supra* (150 N. E. at 589):

"On the one side is the social need that crime shall be repressed. On the other, the social need that law shall not be flouted by the insolence of office."

The same hypothesis is implicit in the analogy to the extorted confession and the further analogy to the federal treatment of a violation of its wire-tap statute. The analogies are not always apt. The extorted confession invariably involves contempt for constitutional right, and the wire-tap necessarily involves a willful violation of a criminal statute. An illegal search and seizure, on the other hand, does not inevitably import conscious illegality. On the contrary, there may be no purpose to flout the Constitution, but only a failure in good faith to stay within the complex rules relating to search and seizure. It is one thing to condemn the product of an arrogant defiance of the Constitution; it is another to impose the sanction when the official intends to respect his oath of office but is found to be mistaken, let us say, by the margin of a single vote.

If the sanction is needed, it would seem to be fitting when there are echoes of the odious writ to search everywhere for anything, or other affronts to the concept of ordered liberty. If the purpose is to protect the guaranty against intentional disregard, why go beyond that target? Surely a breach of the intricate rules of search and seizure under or without a warrant cannot be equated with insolence in office. If a wider sanction is justified, it can only be on the uncertain ground that anything less would be inadequate or unworkable.

As matters now stand, a state may select all, part or none of the exclusionary doctrine. Maryland, for example, legislated the exclusionary rule as to some misdemeanors except in certain portions of that state, but continued the rule of admissibility as to felonies and the misdemeanors excepted. *Salsburg v. Maryland*, 346 U. S. 545 (1954). In South Dakota, after its court adopted the federal rule, the legislature restored the rule of admissibility where the search is made under the color of a warrant. *State v. Lane*, 82 N. W. 2d 286 (S. D. Sup. Ct. 1957). Alabama legislated

the exclusionary rule in the narrow area of offenses against the liquor laws. *Annotation*, 50 *A. L. R.* 2d 531, 555 (1956). Our Legislature, as stated above, spoke to a limited extent in the alcoholic beverage law. *R. S.* 33:1-62.

California switched to the exclusionary doctrine by one vote. *People v. Cahan*, 44 Cal. 2d, 434, 282 P. 2d 905 (Sup. Ct. 1955). The case involved "deliberate, flagrant acts in violation of both Constitutions and the laws enacted thereunder." The court referred to the criticism of the subsidiary rules concerning unreasonable search and seizure developed by the federal courts and expressly reserved to itself the adadoption of workable principles. In footnote 4, the court recognized that unreasonable searches and seizures

> "may involve only minor intrusions of privacy or result from good-faith mistakes of judgment on the part of police officers. There is no reason, of course, why, if the exclusionary rule is adopted, appropriate exceptions could not be developed to govern these latter situations. On the other hand, deliberate, flagrant violations of the constitutional guarantees like those in the present case and in Irvine v. People of California, 347 US 128, 74 S. Ct. 381, may be as dangerous to ordered liberty as the coercion of confessions. (See Allen, Due Process and State Criminal Procedures, 48 Nw. L. Rev. 16, 26-27)."

See *Two Years with the Cahan Rule*, 9 Stanford L. Rev. 515 1957).

Before we overturn or depart from the long-standing rule of admissibility we should be convinced of the necessity, utility and workability of another approach. The judiciary of course is not the sole guardian of the Constitution. The executive branch is equally sworn to uphold it. That the executive here did respect the guaranty is evidence. The trooper did honor the constitutional mandate that a magistrate's judgment intervene between the police and the search. The judgment of a magistrate did intervene, albeit the wrong

magistrate. In this case we find neither "dirty business" nor any need for the sanction of exclusion to discourage it. If events should indicate an appreciable disposition in our State to flout the guaranty, we would not hesitate to seek a solution. The question may well await a more exciting set of facts.

Plaintiffs do allege that "for many years last past the State of New Jersey and its law enforcement officers, including attorneys general and county prosecutors and specifically the defendants herein, has affirmatively sanctioned, practised and encouraged unlawful, unwarranted, unjustifiable and unconstitutional police incursion into the privacy of the citizens of said state and law enforcement officials including the defendants have been encouraged to and have themselves encouraged others subordinate to them and under their jurisdiction and control to take advantage of unconstitutional and unlawful searches." We agree with the Appellate Division that this charge is a mere assembly of generalities, devoid of specific content. At the oral argument we invited particularization, but nothing emerged to justify the probable purpose of the pleader to wedge into the area in which the Federal Supreme Court indicated in *Wolf* that it would intervene. At any rate, plaintiffs are not victims of the program they vaguely allege. It is not asserted that the trooper selected the wrong magistrate to obtain warrants he knew the proper magistrates would have refused.

The judgment is accordingly affirmed.

## MANDATE ON AFFIRMANCE
(Filed 4/28/58)

This cause having been duly argued before this Court by Mr. James M. Davis, Jr., counsel for the appellants and Mr. David D. Furman, counsel for the respondents, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court–Appellate Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court–Appellate Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the twenty-eighth day of April, 1958.

John H. Gildea /s/
Clerk

*Clerk of the Supreme Court*

## MOTION FOR SUBSTITUTION OF PARTY DEFENDANT-RESPONDENT

And now come the plaintiffs-appellants, Harry Eleuteri and Edward Danley, and respectfully move that Honorable David D. Furman, acting Attorney General of New Jersey, be substituted as a party defendant-respondent, in the place and stead of Honorable Grover C. Richman, Jr., formerly the Attorney General of New Jersey.

POWELL AND DAVIS
*Attorneys for Plaintiffs-Appellants*

Dated:
May 5, 1958.

By JAMES B. DAVIS, JR.
*A Member of the Firm*

## ON MOTION FOR SUBSTITUTION OF PARTY DEFENDANT
(Filed 5/12/58)

This matter having been duly presented to the Court, it is Ordered that the motion for substitution of party defendant is granted.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton, this twelfth day of May 1958.

John H. Gildea /s/
Clerk

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

**No. 225**

HARRY ELEUTERI and EDWARD DANLEY,

*Petitioners,*

*vs.*

DAVID D. FURMAN, Attorney General of the State of New Jersey, and MARTIN J. QUEENAN, Burlington County Prosecutor,

*Respondents.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY**

## BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID D. FURMAN,
Attorney General of New Jersey,
*Attorney pro se, and*
*Attorney for Respondent,*
*Martin J. Queenan,*
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MORTON I. GREENBERG,
Legal Assistant,
*On the Brief.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 225

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HARRY ELEUTERI and EDWARD DANLEY,

*Petitioners,*

*vs.*

DAVID D. FURMAN, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY, and MARTIN J. QUEENAN, Burlington County Prosecutor,

*Respondents.*

---

## BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### Opinions Below

The opinion of the Supreme Court of New Jersey is reported in 26 N. J. 506, 141 A.2d 46; that of the Appellate Division of the Superior Court is reported in 47 N. J. Super. 1, 135 A.2d 491; that of the Chancery Division of the Superior Court in 43 N. J. Super. 303, 128 A.2d 473.

### Jurisdiction

The petitioners seek to establish the jurisdiction of this Court under 28 U.S.C. Section 1257(3). Respondents contend that they have asserted no title, right, privilege or immunity subject to protection under Federal law.

## Questions Presented

1. Whether this Court should grant a Writ of Certiorari in view of the established authority, affirmed in *Wolf* v. *Colorado* and *Irvine* v. *California*, that the introduction in a state trial of evidence illegally obtained by a state officer does not constitute a violation of Federal constitutional rights?

2. Whether this Court should consider alleged grounds of invalidity in the issuance of search warrants not raised below or determined adversely to the petitioners by the state courts as a matter of local law?

3. Whether the petitioners on the record are precluded from arguing that the law enforcement officers of New Jersey have as a deliberate plan fomented and encouraged illegal searches and seizures?

## Counter-Statement of the Case

This is a brief in opposition to a petition for writ of certiorari to the Supreme Court of New Jersey. The petitioners, Harry Eleuteri and Edward Danley, seek review of the judgment in favor of Grover C. Richman, Jr., formerly Attorney General of New Jersey, and Martin J. Queenan, Prosecutor of Burlington County, New Jersey. David D. Furman, Attorney General of New Jersey, has been substituted for Grover C. Richman, Jr. (P12a).

On August 22, 1954, Trooper George Dann of the New Jersey State Police, upon his affidavit before Magistrate Charles C. C. Ellis of Chesterfield Township, Burlington County, secured search warrants for the dwelling houses of the petitioners in the City of Bordentown and in Mansfield Township, both in Burlington County, to seize there any materials or things used in connection with gaming in violation of N.J.S. 2A:112-3. Money, gambling slips

and other property were seized at both premises and introduced before the grand jury on the subsequent criminal complaints against the two petitioners.

Indictments were found charging both petitioners with violation of N.J.S. 2A:112-3. The petitioners then filed a civil action in the Superior Court of New Jersey, Chancery Division, seeking injunctive relief against the use of the materials thus seized in the trial of the indictments. The petitioners claimed that the searches and seizures were invalid and unreasonable under the Federal and State constitutions. On motion, summary judgment was granted by the Chancery Division in favor of the defendants. 43 N. J. Super. 303, 128 A.2d 473. The Appellate Division of the Superior Court affirmed this decision, 47 N. J. Super. 1, 135 A.2d 191 and was, in turn, affirmed by the Supreme Court of New Jersey. 26 N. J. 506, 141 A.2d 46.

The Supreme Court of New Jersey held that the search warrants had been illegally executed because the magistrate who had issued them was the magistrate of Chesterfield Township and lacked territorial jurisdiction to issue search warrants for nearby municipalities. The highest state court denied injunctive relief in a comprehensive opinion affirming the New Jersey rule that illegally seized evidence is admissible in a criminal trial if material and competent *per se*.

The petitioners assert here additional grounds of alleged invalidity of the search warrants. They claim for the first time that the search was unreasonable since the warrant was issued on hearsay rather than on personal information. They renew the objections decided against them in the New Jersey courts that the description of the things to be seized was inadequate because the wrong street address was given in one of the warrants and that no New Jersey statute authorized the issuance of search warrants.

The State court's judgment recognized the illegality of the search warrants on the single ground of the magistrate's lack of authority and should be affirmed in accordance with *Wolf v. Colorado*, 338 U. S. 25 (1949), and *Irvine v. California*, 347 U. S. 128 (1954), without regard to additional grounds of alleged invalidity of the search warrants.

## ARGUMENT

### POINT I

**No substantial federal question different from that decided in *Wolf* v. *Colorado*, 338 U. S. 25 (1949) is involved in this case.**

This Court is called upon by the petitioners to reopen and to overrule its established rule that a state court may admit evidence in a criminal trial illegally obtained by state law enforcement officers, without denying federal constitutional rights.

In *Wolf* v. *Colorado*, 338 U. S. 25 (1949) the Court held that the Fourteenth Amendment forbids unreasonable searches and seizures by state officers, but reaffirmed that use of evidence obtained from such searches and seizures in the state courts is not prohibited by the requirements of due process. According to the opinion of the Court, each state may decide for itself whether the constitutional right of freedom from unreasonable searches and seizures is to be enforced by the exclusionary rule of the federal courts (*Weeks v. United States*, 232 U. S. 383 (1914)) or by sanctions against the offending police officer.

In *Irvine v. California*, 347 U. S. 128, 135-36 (1954), this Court declared:

> "Our cases evidence the fact that the federal rule of exclusion and our reversal of conviction for its

violation are not sanctions which put an end to illegal search and seizure by federal officers. The rule was announced in 1914 in *Weeks* v. *United States*, 232 U. S. 383. The extent to which the practice was curtailed, if at all, is doubtful. The lower federal courts, and even this court, have repeatedly been constrained to enforce the rule after its violation. There is no reliable evidence known to us that inhabitants of those states which exclude the evidence suffer less from lawless searches and seizures than those of states that admit it."

*Wolf* v. *Colorado* has again been reaffirmed in *Breithaupt* v. *Abram*, 352 U. S. 432 (1957). The petitioners present no constitutional right, any different from that asserted in *Wolf* v. *Colorado*.

## POINT II

**The additional grounds for asserting the illegality of the searches and seizures in this case should not be considered by this Court because they were determined adversely to the petitioners below or are raised for the first time on the petition for writ of certiorari.**

The petitioners attack the validity of the search warrants issued by Magistrate CHARLES C. C. ELLIS of Chesterfield Township on several grounds. Throughout the litigation in the State courts the respondents conceded the illegality of the search warrants issued by Magistrate ELLIS for premises outside the territorial jurisdiction of his court (N.J.S. 2A:8-20, 21).

The Supreme Court of New Jersey ruled specifically that the search warrants were not void for want of a statute expressly authorizing search warrants in gambling cases. The highest court of the state likewise struck down the

objection that the papers and things to be seized were not described with sufficient explicitness. As to the apparent variance between the street number of the petitioner Danley's dwelling house at 52 E. Main Street, Mansfield Township and the address cited in the search warrant at 54 E. Main Street, Mansfield Township, the Supreme Court failed to rule conclusively. The New Jersey law thus remains that a search warrant for the wrong address is valid if the description is sufficient to apprise the police officer of the location: *In re Simon*, 13 N. J. Misc. 196, 177 Atl. 557 (Co. Ct. 1935).

The state courts' determinations of the lawfulness of the search warrants in all respects other than the magistrate's lack of authority are valid holdings on matters of local law, not in conflict with the interdiction of the Fourth and Fourteenth Amendments against unreasonable searches and seizures.

The petitioners claim for the first time on this petition for writ of certiorari that there was no showing of proper cause to believe that a crime was being committed because the State Trooper's affidavits upon which the search warrants were issued were founded solely on hearsay (Pb18-20). This point was not raised in the original or amended complaints and was not treated by the Supreme Court of New Jersey in its opinion. It should, therefore, not be considered here. *Edelman v. California*, 344 U. S. 357 (1953); *Shelley v. Kraemer*, 334 U. S. 1, 8-9 (1948); *Matheson v. Branch Bank of Alabama*, 48 U. S. (7 How.) 260 (1849).

This case, therefore, stands as a state court determination that evidence is admissible in a criminal trial if illegally obtained because of the lack of jurisdiction of the issuing magistrate. The opinion by Chief Justice WEINTRAUB in the Supreme Court of New Jersey emphasized that:

> "In sum total, for the purpose of this appeal, illegality is clear, but equally clear is the fact that the trooper in good faith attempted to comply with the applicable mandate of the Constitutions, Federal and State, that a magistrate's decision intervene between the police and the search." 26 N. J. at 509; 141 A.2d at 48.

## POINT III

**The petitioners may not argue that the law enforcement authorities of New Jersey have encouraged unreasonable searches and seizures.**

The petitioners claim that they have asserted a cause of action within a possible exception to the general rule of *Wolf v. Colorado, supra*. In *Wolf* the Court implied that if the law enforcement authorities of a state affirmatively sanctioned unreasonable searches and seizures it might feel compelled to exclude the evidence thus procured from state courts. 338 U. S. at 28.

Whether or not this possible exception exists, the petitioners have failed to properly bring themselves within it despite their allegations. The petitioners pleaded on the amended complaint a conclusion without supporting facts that the citizens of New Jersey are exposed to systematic illegal searches and seizures. As a matter of state law, the Supreme Court and the Superior Court, Appellate Division, both held that the respondents' motion for summary judgment, which admitted all well-pleaded material allegations of the complaint, did not constitute an admission of the shocking and unsupported conclusion of a state policy of unlawful police incursions.

The petitioners were invited by the Supreme Court of New Jersey to explain what evidence was available to

support their allegations of willful infringement of the Fourth Amendment., That court declared:

> "At the oral argument we invited particularization, but nothing emerged to justify the probable purpose of the pleader to wedge into the area in which the Federal Supreme Court indicated in *Wolf* that it would intervene." 26 N. J. at 516, 141 A.2d at 52.

Similarly the Appellate Division of the Superior Court had noted:

> "Neither the complaint nor anything said on behalf of the plaintiffs in the argument supports the thought that their contention is anything more than that the case rule against suppression or exclusion of illegally secured evidence tends to encourage violation of the constitutional guarantee." 47 N. J. Super. at 25, 135 A.2d at 203.

Had the petitioners shown the Appellate Division or the Supreme Court of New Jersey some basis for this allegation, either court could have exercised its original jurisdiction and made findings as to the truthfulness of the allegations. *New Jersey Constitution of 1947*, Art. VI, Sec. 5, par. 3.

As noted above this case was decided on the present respondents' motion for summary judgment. Under New Jersey Revised Rules 4:58-3 the plaintiff may resist a motion for summary judgment by supporting his claim with affidavits. Therefore, the argument that the petitioners were deprived of their opportunity to prove the allegations in their complaints misrepresents New Jersey procedure. See *Judson* v. *People's Bank & Trust Co.*, 17 N. J. 67, 75, 110 A.2d 24, 28 (1954); *A. Kaplan & Son, Ltd.* v. *Housing Authority*, 42 N. J. Super. 230, 235, 126 A.2d 13, 16 (App. Div. 1956).

The attempt to assert the *Wolf* exception was rejected not because the New Jersey Supreme Court felt that it should not be followed but rather because under New Jersey procedure the petitioners failed to plead or to offer evidence to substantiate their claims. Therefore, the decision on this point was made on adequate nonfederal grounds and is not subject to review here. *Staub v. City of Baxley*, 355 U. S. 313 (1958); *Hammerstein v. Superior Court*, 340 U. S. 622, *cert. dismissed*, 341 U. S. 491 (1951); *Chappel Chemical and Fertilizer Co. v. Sulphur Mines Co.*, 172 U. S. 465 (1899).

## CONCLUSION

**The respondents, David D. Furman, Attorney General of New Jersey and Martin J. Queenan, Burlington County Prosecutor, therefore pray that certiorari be denied.**

Respectfully submitted,

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*Attorney for Respondent,*
*Martin J. Queenan.*

MORTON I. GREENBERG,
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